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80-1217

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CITY OF GALLUP,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January 19, 1981

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QUESTION PRESENTED

1. Does the Federal Energy Regulatory Commission have the authority to order an increase in rates fixed by contract without complying with the legal standard mandated by this Court in *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956)?

PARTIES TO THE PROCEEDING BELOW

City of Gallup, New Mexico

Federal Energy Regulatory Commission

Public Service Company of New Mexico

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at 628 F.2d 1267 and is reprinted in the Appendix to this petition (App. 1). That opinion affirmed in part and reversed in part orders of the Federal Energy Regulatory Commission (hereinafter FERC or the Commission) in *Public Service Company of New Mexico*, Docket No. E-9454, issued July 5, 1978 (published at 15 FPS 5-383) (App. 67) and December 15, 1978 (unpublished) (App. 70) and orders in

Public Service Company of New Mexico, Docket Nos. ER78-337 and ER78-338, issued June 30, 1978 (unpublished) (App. 24) and December 15, 1978 (unpublished) (App. 38).

Orders issued by the Commission in *Public Service Company of New Mexico*, Docket No. E-9454 were previously affirmed by the court of appeals in *Public Service Co. v. FPC,* 557 F.2d 227 (10th Cir. 1977) (App. 10).

JURISDICTION

The judgment of the court of appeals, review of which is sought, was entered on August 11, 1980. A timely petition for rehearing was denied on October 21, 1980 and this petition for writ of *certiorari* was filed within 90 days of that date. Jurisdiction to review the judgment is conferred on this Court by 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The pertinent statutes are Section 205 of the Federal Power Act, 16 U.S.C.A. §824d (West Supp. 1980) (App. 73) and Section 206 of the Federal Power Act, 16 U.S.C.A. §824e (1976) (App. 76).

STATEMENT OF THE CASE

Petitioner, City of Gallup (hereinafter Gallup) operates a municipal electric company that purchases electric power at wholesale and then resells that power at retail to customers within the municipality. Gallup purchases wholesale power from the Public Service Company of New Mexico (hereinafter PNM) in accordance with a contract having designated fixed rates. The contract was

originally executed in 1962 and amended in 1968 and 1970.[1]

Because Gallup is a wholesale for resale customer of PNM, the PNM-Gallup contract is subject to the jurisdiction of the Federal Energy Regulatory Commission under authority granted that Commission by the Federal Power Act, 16 U.S.C. §824 *et seq.* (1976) (amended 1978). *See FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964).

This petition results from the opinion of the court of appeals, issued August 18, 1980 in *Public Service Co. v. FERC*, 628 F.2d 1267, 1269-70 (10th Cir. 1980), which affirmed rulings made by the Commission to the effect that the standard set forth by this Court for setting aside a fixed rate contract was not applicable to the PNM-Gallup contract. The rulings of the Commission that were affirmed by the court of appeals interpreted the decision rendered by this Court in *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The procedural history culminating in the court of appeals' opinion below is somewhat complex.

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[1]The contract involved herein, (App. 82-107), contains the following relevant provision:

Article V

(A) *Rates:* All power and energy supplied Consumer by Company hereunder shall be paid for by Consumer at the following monthly rate:

A monthly demand charge of:

$2.00 per KW of monthly billing demand determined as hereinafter provided.

Plus a monthly energy charge of:

3.25 mills ($0.00325) per KW for all electric energy delivered to Consumer by Company during the month.

On April 21, 1975, PNM, without the consent of Gallup, submitted to the Commission revisions to the contract rate schedules for service to Gallup with a designated effective date of July 31, 1975, pursuant to Section 205 of the Federal Power Act.[2] On June 30, 1975, Gallup filed with the Commission a protest and petition to intervene claiming that unilateral rate increases were barred by the terms of Gallup's contract with PNM and the decisions of the Supreme Court in *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

In an order issued on July 31, 1975,[3] the Commission agreed with Gallup's contentions and refused to allow the rate increase to go into effect until after Section 206 hearings had been held, but inconsistently ruled that the burden of proof standard set forth by the Supreme Court did not apply. The Commission reasoned that:

> Since the parties provided for a change in rate only by order issued by the Commission, it is clear they did not contemplate the unilateral filings permitted by Section 205. Accordingly, we shall institute a Section 206(a) proceeding and set the just and reasonable rate for PNM's service to Gallup pursuant

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[2] Under Section 205, a rate increase will become effective unless suspended by the Commission. The maximum amount of time for which the Commission may suspend the increase is five months. After the suspension period expires, the rate increase becomes effective subject to future refunds ordered by the Commission following a hearing investigating the reasonableness of the increase. In contrast, under Section 206 of the Act, 16 U.S.C. §824e (1976) (App. 76), a rate increase cannot become effective until *after* hearings have been conducted.

[3] Order Denying Motion to Reject, Instituting Section 206(a) Proceeding Granting Interventions, and Establishing Dates, Docket No. E-9454 issued July 31, 1975, (App. 45).

to Section 206(a),[5] any change to be prospective in application.

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[5] We note that the procedures under such a Section 206(a) proceeding would not entail meeting the heavy burden of proof associated with the *Mobile-Sierra* decisions.

Order issued July 31, 1975, (App. 49).

Petitions for rehearing filed by both parties were denied by the Commission in an order issued September 26, 1975.[4]

Both Gallup and PNM sought judicial review of the Commission's order. PNM maintained that the contract between the Company and Gallup permitted unilateral rate increases. Gallup argued that the Commission's burden of proof holding violated the rule of *Sierra.*

The Tenth Circuit rejected the contentions of PNM stating that, "we agree with the Commission that the 'Change in Rate' paragraph in the contract did not give or imply a right in PNM to make the unilateral rate filing." *Public Service Co. v. FPC*, 557 F.2d 227, 229-31 (10th Cir. 1977) (App. 18).

Gallup's appeal was dismissed without prejudice on the ground that Gallup was not then aggrieved and could only be adversely affected if the Commission, in the Section 206(a) proceedings, ultimately sought to change Gallup's contract rates. *Id.* at 232-33, (App. 21-23).

Subsequent to this decision, Section 206(a) proceedings were instituted. At the hearing, testimony submitted in support of Gallup's contention that PNM's case for a

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[4] Order Denying Application for Rehearing and Petition for Rehearing, Docket No. E-9454, issued September 26, 1975, (App. 54).

rate increase did not meet the standard established in *Sierra* was stricken from the record. Hearing Transcript Docket No. E-9454, pp. 344-46, December 15, 1976, (App. 119-121).

The administrative law judge proceeded to render an Initial Decision on the Company's presentation without reference to the standard set forth in the *Sierra* case and found that a rate increase was proper. At no time did PNM present any evidence to meet the *Sierra* standard and it is conceded that the record contains no such proof. The Commission again reaffirmed that the *Sierra* standard did not apply and issued its decision approving a rate increase for the City on July 5, 1978, (App. 67).

The second Section 206 hearing was held in June of 1978 following the filing of another proposed rate increase by PNM in April of that year. Once again, the Commission concluded that the evidentiary standard mandated by this Court in *Sierra* did not apply to the Gallup-PNM contract. Order issued June 30, 1978, Docket Nos. ER78-338, ER78-339, (App. 24). In making this finding, the Commission relied on its prior orders of July 31 and September 26, 1975 in the E-9454 docket. Instead of determining whether the existing contract rates were so low as to "adversely affect the public interest," *Sierra,* 350 U.S. at 355, the Commission reviewed the proposed rates to determine whether they were "just and reasonable" as if they had been filed under Section 205.

The Petition of Gallup for rehearing of the July 5, 1978 order issued in Docket No. E-9454 and Gallup's petition for rehearing of the June 30, 1978 order in Docket No. ER78-338 were denied by the Commission on December 15, 1978. Docket No. ER78-337, Order on Rehearing Denying Requested Relief issued December

15, 1978, (App. 38); Docket No. E-9454, Order Denying Rehearing issued December 15, 1978, (App. 70).

The subsequent petition of PNM for review of the agency orders, filed pursuant to Section 313 of the Federal Power Act, 16 U.S.C. §824*l* (1976), (App. 77),[5] was considered by the court of appeals.

In an opinion issued on August 11, 1980, the Tenth Circuit affirmed the Commission's refusal to apply the *Sierra* burden of proof to the Gallup-PNM contract. *Public Service Co. v. FERC*, 628 F.2d 1267 (10th Cir. 1980) (App. 1). The court of appeals, despite the similar language in the Gallup-PNM contract to that in the contract before this Court in the *Sierra* case, reasoned that the parties to the rate contract contemplated Commission-ordered rate changes. Therefore, the contract was not for a "fixed rate" and the *Sierra* standard need not be met in order for the Commission to raise rates above those set by the contract. (App. 5-8).

The Tenth Circuit denied Gallup's petition for rehearing on October 21, 1980, (App. 9), and this timely petition for writ of *certiorari* ensued.

REASONS FOR GRANTING THE WRIT

1. *Conflict With Decisions Of The Supreme Court*

The Tenth Circuit opinion in this case directly conflicts with the decisions of this Court in *United Gas Pipeline Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956) and *Sierra Pacific Power Co. v. FPC*, 350 U.S. 348 (1956).

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[5]This statute provides the basis for jurisdiction in the court of appeals. (This statement is made in compliance with this Court's Rule 21.1(i)).

In *Mobile*, this Court held that the Natural Gas Act did not give utility companies the authority to alter rates set by contract simply by filing a rate increase with the Commission.[6] In so ruling, the Court noted that:

> The very premise that §§4(d) and (e) and 5(a) are alternative rate-changing "procedures" is itself based on a misconception of the structure of the Act. These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful.

350 U.S. at 340-41.

The Court found that the power given the Commission under the Act to modify any rate contract "is neither a 'ratemaking' nor 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them," *id.* at 341, and concluded that:

> In short, the Act provides no "procedure" either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates.

Id. at 343 (emphasis in original).

The *Mobile* Court recognized that denying a utility the authority unilaterally to increase its rates did not "lock

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[6] *Mobile* construed Sections 4(c), (d), (e) and 5(a) of the Natural Gas Act, 15 U.S.C. §§717c(c), (d), (e) and 717d(a) (1976). These statutes are "substantially identical" to Sections 205(c), (d), (e) and 206(a) of the Federal Power Act respectively. *See* Sierra Pac. Power Co. v. FPC, 350 U.S. at 348, 353.

in" companies to their contracts. Under Section 5(a) of the Act, a company could request a Commission investigation of the contract rate:

> And if the Commission, after hearing, determines the contract rate *to be so low as to conflict with the public interest*, it may under §5(a) authorize the natural gas company to file a schedule increasing the rate.

Id. at 345 (emphasis added).

The *Sierra* decision, issued the same day as *Mobile*, extended the *Mobile* holding to the Federal Power Act and instructed the Commission as to the findings that would be necessary to justify a rate *increase* following hearings under Section 206 of the Federal Power Act. In *Sierra*, the Commission had simultaneously found a new rate to be reasonable and an existing rate to be unreasonable. The Commission ruled the existing rate unreasonable solely because it would result in a low rate of return to the utility.

This Court first held that the filing of the new rate was not effective to change the existing contract rate. It went on to consider whether the Commission's finding that the new rate was just and reasonable, "satisfied in substance the requirements of §206(a)." *Sierra*, 350 U.S. at 353. In answering this question in the negative, Mr. Justice Harlan, speaking for a unanimous Court, stated:

> [t]hat the purpose of the power given the Commission by §206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in §201 of the Act that the scheme of regulation imposed "is necessary in the public interest." When §206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either "unjust" or

> "unreasonable" simply because it is unprofitable to the public utility.

Id. at 355.

The Court defined an unjust or unreasonable contract rate as one which is, "*so low as to adversely affect the public interest*—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Id.* at 355 (emphasis added). Thus, the *Mobile-Sierra* decisions distinguish the "just and reasonable" language of Section 205 (which applies when the Commission is *reviewing* a rate increase unilaterally filed by a utility) from the public interest standard to be applied under Section 206 (when the Commission is *ordering* an increase in rates otherwise fixed by contract).[7]

After the *Mobile, Sierra,* and *Memphis* decisions it would seem obvious that "the Commission has no authority, absent a finding that the existing contract rate

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[7]The scope of the *Mobile-Sierra* doctrine was further explained by this Court in *United Gas Pipeline Co. v. Memphis Light Gas and Water Division*, 358 U.S. 103 (1958). In *Memphis*, this Court reiterated that the threshold *Mobile* issue was whether the terms of the rate contract gave the utility the right unilaterally to increase rates. The contract provided that gas would be paid for in accordance with an attached rate schedule, "or any effective superceding rate schedules on file with the Federal Power Commission." *Id.* at 105. The Court found that this contract language did indeed "expressly reserve" to United the right unilaterally to increase rates, *id.* at 112, distinguishing the agreement from the *Mobile* contract which established a "single fixed rate" for a specific time period. *Id.* at 110. The Commission below held that the language of the Gallup-PNM contract was not *Memphis* language and did not give PNM the right to make unilateral rate increases under Section 205, (App. 49). This holding of the Commission was approved by the Tenth Circuit in its first decision (App. 18) which is not at issue at the present time.

'is so low as to have an adverse effect on the public interest' . . . to raise [contract] rates in excess of the maximum authorized [by the existing contract.]" *FPC v. Texaco*, 417 U.S. 380, 391 n.4 (1974). In the instant case, however, the Commission, contrary to the mandate of *Sierra*, did raise rates above the maximum allowed by contract without applying the Section 206 definition of "just and reasonable", i.e., without finding that the existing contract rate adversely affected the public interest. Clearly, both the Commission's decision and the affirming opinion of the Tenth Circuit directly conflict with the holding of *Sierra*.

The Commission and the Tenth Circuit based their decisions on a conclusion that Article II and Article XII of the Gallup-PNM contract demonstrated that the parties to the agreement contemplated Commission-ordered changes in the contract rates, (*see* App. 5). This theory is plainly wrong and in essence permits the Commission to improperly refuse to follow this Court's decisions in the *Mobile-Sierra* cases. First, the language of Article XII of the Gallup-PNM contract is substantively identical to that of Article XII of the *Sierra* contract, (*see* App. 117). The Commission itself had previously ruled that the language of Article II was irrelevant to the question of whether the *Sierra* rule against unilateral rate filings applied, (App. 47). Surely, after *Sierra*, any party contemplating Commission-ordered increases above the contract rate would also contemplate that those changes would only occur if the evidentiary standard of *Sierra* was met. Moreover, even if the Commission's theory is valid, the conflict with *Sierra* still exists. One scours the pages of *Mobile*, *Memphis*, and *Sierra* searching for any language or logic contained therein indicating that the *Sierra* standard will not apply if parties to an agreement envision Commission-ordered rate changes. The search is

futile. Those decisions contain no such language. In effect, the Commission and the Tenth Circuit have assumed away the very issue presented by this petition: whether the Commission may ever raise rates above those fixed by contract without first making the finding required by *Sierra.*

Article V unequivocally fixes the rate to be paid by Gallup for electricity received from PNM. Article II of the contract specifies that the rate is to be constant for a period of twenty-five years. Gallup agreed to close down its generating plant in consideration of PNM's commitment. Plainly, the contract is not a *Memphis* "going rate" agreement. Plainly, the contract does not allow PNM unilaterally to increase its rates. *See Public Service Co. v. FPC,* 557 F.2d 227, 229-31 (10th Cir. 1977) (App. 14-21).

Sierra held that, in such a situation, a finding that the existing contract rate adversely affects the public interest *must* be made before the Commission can raise the rates above the contract level. In this case, the court of appeals and the Commission have held that a lesser standard may be used, even if the utility cannot increase the fixed contract rate unilaterally. The conflict is direct and irreconcilable.

2. *Conflict With Other Circuits*

The Tenth Circuit's reasoning also conflicts with the reasoning applied by the Court of Appeals for the District of Columbia Circuit in answering the threshold *Mobile-Sierra* question concerning the ability of a utility unilaterally to increase rates. In *Boroughs of Chambersburg v. FERC,* 580 F.2d 573 (D.C. Cir. 1978), the District of Columbia Circuit defined a fixed-rate contract as, "one that does not permit a public utility to effect unilateral rate increases merely by filing them with the Commission." *Id.* at 547 n.2.

This definition is consistent with the *Memphis* decision which turned on whether the contract "expressly reserved" to the utility the right unilaterally to increase rates. 358 U.S. at 112. The District of Columbia Circuit has explicitly considered and explicitly rejected the Tenth Circuit's theory that contracts which contemplate regulatory change are not fixed-rate contracts. *E.g., Papago Tribal Utility Authority v. FERC,* 610 F.2d 914, 920-23 (D.C. Cir. 1979); *City of Oglesby v. FERC,* 610 F.2d 890, 911-14 (D.C. Cir. 1979); *Richmond Power & Light v. FPC,* 481 F.2d 490 (D.C. Cir. 1973), *cert. denied,* 414 U.S. 1068.

The theory has been rejected by the District of Columbia Circuit because it is patently unsound. Regardless of whether a party envisions change by the FERC at the time it enters into a rate contract, under the law, such a change is possible.[8] To the extent that such change may occur, a true "fixed-rate" contract will never exist. Thus, a finding that parties to a rate contract "contemplated" change is irrelevant to the determination of whether a contract is one for a fixed rate.[9] In fact, the contract

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[8] As stated by the District of Columbia Circuit:

> The Commission says that the parties contemplated rate changes "by the order or with the approval of" the appropriate regulatory Commission. This may well be true, but it is beside the point. The issue under *Memphis* is not whether the parties contemplated change by the appropriate regulatory authority, *for under the law every electric power contract must contemplate such change.*

Richmond Power & Light, 481 F.2d at 499 (emphasis added).

[9] The Commission itself has refused to accept the logic it follows in this case. In Carolina Power & Light Co., 47 F.P.C. 1 (1972), an administrative law judge ruled:

> *Respondent notes that Rate Schedule RS-4 expressly recognizes that the schedule is subject to change by action of a*

[footnote continued]

before this Court in *Sierra* contemplated regulatory changes.[10] By its terms, the *Sierra* decision applies to all contracts not unilaterally modifiable by a utility under Section 205 procedures. *Sierra* sets the standard for determining when the rates set by such contracts are unjustly and unreasonably low. By refusing to apply that definition in this instance, the Commission and the Tenth Circuit have placed themselves in conflict with the *Sierra* rule as construed by the District of Columbia Circuit relating to what is a fixed rate contract. In order to resolve that conflict, this petition for *certiorari* should be granted.

3. This Case Presents An Important Question

The decision below of the Tenth Circuit should be reviewed because the differing opinions of this Court in *Sierra* and the Tenth Circuit in *City of Gallup v. FERC* raise an important question in the administration of the Federal Power Act. *See Mobile*, 350 U.S. at 337; *Sierra*, 350 U.S. at 352; *Memphis*, 358 U.S. at 109. The court of appeals' misinterpretation of the *Sierra* decision seriously

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> *regulatory body*, and that the Government-Customer Contracts contain a like recognition concerning the rate for deficiency energy. *These are irrelevant considerations. All rates are subject to change by regulatory action, whether or not a contract so provides. That respondent, as it contends, has a right unilaterally to change the rate schedules is a non sequitur.*

Id. at 13-14 (emphasis added). The Commission expressly accepted the law judge's findings. *Id.* at 4.

[10] Section XII of the Sierra-Pacific agreement, (App. 117), read as follows:

> This agreement shall at all times be subject to such changes and/or modifications as said Commission may from time to time direct in the exercises of its jurisdiction.

("Commission" in this clause meant the California Public Utilities Commission.)

frustrates the proper administration of the Federal Power Act.

There are more than 2,000 municipal electric companies in this country.[11] The vast majority of the municipal operations purchase wholesale power pursuant to rate contracts with large investor-owned utilities.

Municipal utilities are not the only entities affected by the FERC's policy of ignoring the *Sierra* decision whenever contracts contain language similar to Article XII. The Commission's interpretation of *Sierra* will apply to all rate contracts subject to Commission jurisdiction. The question of whether contracts permit unilateral rate increases has spawned a significant amount of litigation. *E.g., Towns of Alexandria v. FPC*, 555 F.2d 1020 (D.C. Cir. 1977); *City of Cleveland v. FPC*, 525 F.2d 845 (D.C. Cir. 1976), *compliance directed* 561 F.2d 344 (D.C. Cir. 1977); *Gulf States Utilities Co. v. FPC*, 518 F.2d 450 (D.C. Cir. 1975); *Montaup Electric Co.*, 52 F.P.C. 1865 (1974).

It can be expected that a similar amount of litigation will result if the Commission continues to impose its misinterpretation of *Sierra* on wholesale electric customers. A ruling from this Court on the *Sierra* issue would avoid further repetitive litigation and decrease regulatory delay.

The decision as to whether the *Sierra* burden of proof applies in Section 206 hearings has a significant impact on the nature of the proceedings and the evidence presented. *See Metropolitan Edison Co. v. FERC*, 595 F.2d 851 (D.C. Cir. 1979); *Carolina Power & Light Co.*, 52 F.P.C. 1841 (1974); *Mississippi Power Co.*, 50 F.P.C.

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[11]Public Power Fact Sheet of the American Public Power Association.

885 (1973). If the *Sierra* burden is applied to contracts containing boilerplate "regulatory change" clauses, rate increases which have not met this Court's *Sierra* standard will take effect. If *certiorari* is not granted uncertainty as to the applicability of the *Sierra-Mobile* doctrine to existing contracts will continue for both utilities and their customers.[12]

Most importantly, this Court should continue to oversee the implementation of its decisions, especially where, as here, they have been relied upon by parties in their contractual arrangements. The history of the FERC's response to the *Mobile-Sierra* decisions is one where the agency consistently has sought to avoid compliance by a number of different "end runs", which have been rejected in various decisions. *See City of Kaukauna v. FERC*, 581 F.2d 993 (D.C. Cir. 1978); *Borough of Lansdale v. FPC*, 494 F.2d 1104 (D.C. Cir. 1974) and cases cited *supra* at 13. The present case, however, represents a new type of "end run" which the court below erred in not correcting.

The Commission has made it plain that, "in our judgment the *Mobile-Sierra* rule is inconsistent with sound regulatory policy. That rule has the effect of limiting our authority under Section 206(a) of the Federal Power Act." *Carolina Power & Light Co.*, 47 F.P.C. 1, 4 (1972). *See also Philadelphia Electric Co.*, 48 F.P.C. 422, 424 (1972).

Though the Commission does not like the *Sierra* rule, it cannot ignore the law of the land as set down by

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[12] Under the Federal Power Act, the Commission is required to protect consumers. *See* Permian Basin Area Rate Cases, 390 U.S. 747 (1968); FPC v. Tennessee Gas Co., 371 U.S. 145, 154 (1962); FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944).

decisions of the Supreme Court. This Court must continue to oversee the implementation of *Sierra* in order to ensure that the rule enunciated in that decision is correctly applied by the courts of appeals and the Commission. In this instance, the Commission has interpreted *Sierra* so as to limit severely and significantly the impact of that decision. That interpretation has been affirmed by the Tenth Circuit. This Court should grant *certiorari* to determine whether the FERC interpretation of *Sierra* is valid.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that a writ of *certiorari* issue forthwith to the Tenth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PUBLIC SERVICE COMPANY
OF NEW MEXICO,

Petitioner,

v. No. 78-2007

FEDERAL ENERGY
REGULATORY COMMISSION,

Respondent.

CITY OF GALLUP,

Petitioner,

v.

FEDERAL ENERGY
REGULATORY COMMISSION, Nos. 79-1275
79-1276

Respondent,

PUBLIC SERVICE COMPANY
OF NEW MEXICO,

Intervenor.

ON PETITIONS FOR REVIEW OF ORDERS OF
FEDERAL ENERGY REGULATORY COMMISSION

Paul H. Keck of Morgan, Lewis & Bockius, Washington, D.C. (Michael F. Healy of Morgan, Lewis & Bockius, William B. Keleher and Richard B. Cole of Keleher & McLeod, Albuquerque, New Mexico, with him on the brief), for Petitioner-Intervenor Public Service Company of New Mexico.

Charles F. Wheatley, Jr. of Wheatley & Wollesen, Washington, D.C. (Woodrow D. Wollesen and Robert A. O'Neil, with him on the brief), for Petitioner City of Gallup.

George H. Williams, Jr., Attorney, Federal Energy Regulatory Commission, Washington, D.C. (Robert R. Nordhaus, General Counsel, and Jerome Nelson, Solicitor, with him on the brief), for Respondent.

Before SETH, Chief Judge, McKAY and LOGAN, Circuit Judges.

SETH, Chief Judge.

These three cases were consolidated for hearing as each seeks review of orders of the Federal Energy Regulatory Commission. The particulars of each petition will be described in the following sections.

Case 78-2007

The Public Service Company of New Mexico seeks to review orders of the Federal Energy Regulatory Commission entered in Docket No. E-9454 insofar as they required Public Service Company of New Mexico to file the contract covering its coal purchases from Western Coal Company. The Commission based this portion of its orders of July 5th and December 15th of 1978 on section 35.14(a)(7) of its regulations. The regulations in part read:

> "Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such

> cost shall be deemed to be reasonable and includable in the adjustment clause.... With respect to the price of fuel purchases from company-owner or controlled sources pursuant to contracts which are not subject to regulatory authority, the utility company shall file such contracts and amendments thereto with the Commission for its acceptance.... Any subsequent amendment to such contracts shall likewise be filed with the Commission as a rate schedule change and may be subject to suspension under section 205 of the Federal Power Act." 18 C.F.R. §35.14(a)(7).

Under related Commission regulations if the contract must be filed, any subsequent changes in it are treated for all practical purposes as rate schedule changes. The contract or a copy was, of course, furnished during the course of the hearing and considered.

Public Service Company of New Mexico urges that the regulation is not applicable so as to require filing under section 35.14 for the reason that there were no facts developed at the hearings as to "control" except that PNM owned 50% of the stock of Western Coal, and in any event the *contract* was subject to the "regulatory authority" of the New Mexico Public Service Commission.

The record does not show that PNM had actual "control" over Western Coal. This issue was not considered during the course of the hearings as a fact issue, and the Administrative Law Judge made no finding on the point. We have held that control is a fact question. SEC v. International Chem. Dev. Corp., 469 F.2d 20 (10th Cir.). As mentioned, all the record shows is that PNM owns 50% of the coal company stock and Tucson Gas and Electric owns the other 50%. There is no basis in the record for the Commission's determination as to control

assuming that the issue was properly before it in view of the procedural deficiencies.

The regulation relating to filing quoted above (§35.14(a)(7) applies only to contracts "which are not subject to regulatory authority." The record demonstrates that the New Mexico Public Service Commission does not "regulate" Western Coal, but it must pass on the *contract* between Western Coal and PNM to determine whether it is reasonable. This would seem to meet the requirement of the FERC regulations in that it is the "contract" which is referred to, not Western Coal as an entity. When the regulation says "contracts" it clearly means contracts and the matter is not subject to interpretation. United States v. Ray, 488 F.2d 15 (10th Cir.).

The authority of the New Mexico Public Service Commission under chapter 85 of the laws of 1980 of New Mexico has been clarified with the recent enactment of the following provision:

> "The sale, furnishing or delivery of coal, uranium or other fuels by any affiliated interest to a utility for the generation of electricity for the public shall be subject to regulation by the commission but only to the extent necessary to enable the commission to determine that the cost to the utility of such coal, uranium or other fuels at the point of sale is reasonable. . . ."

We must hold that the determination by the Commission as to "control" had no basis in the record, and that the decision as to whether the coal *contract* was subject to "regulatory authority" was in error. Thus the Commission order insofar as it directs filing of the PNM-Western Coal contract with the Commission under 18 C.F.R. §35.14(a)(7) is set aside.

Cases 79-1275 and 79-1276

The City of Gallup, New Mexico petitioned to have reviewed in 79-1275 the order of the Federal Energy Regulatory Commission entered in Docket No. ER 78-338, and in 79-1276, the orders entered in Docket No. E-9454. This court in Public Service Co. of N.M. v. FPC, 557 F.2d 227 (10th Cir.), reviewed other orders in E-9454. The Public Service Company of New Mexico appears as an intervenor in support of the rate schedule adopted by the Commission.

The orders here concerned approved certain rates to be charged Gallup by PNM. The Commission in considering the new rates concluded that the existing PNM-Gallup contract was not a "fixed rate" contract. Having made this determination the Commission applied the standard for section 206 hearings, 16 U.S.C. §824e(a), sec. 206(a) of the Act, thus whether the rates are "just and reasonable," rather than the *Sierra* burden for "fixed rate" contracts that is whether the contract rates are so low "as to adversely affect the public interest." *See* FPC v. Sierra Pacific Power Co., 350 U.S. 348, and related cases.

The City of Gallup urges that the PNM-Gallup contract is a "fixed rate" contract contrary to the position of the Commission. There would seem to be no reason to describe the analysis of the contract used to decide the issue. It is sufficient to point out that the parties agreed in the contract that:

> "This contract, including the tariff made a part hereof, shall at all times be subject to such changes or modifications as shall be ordered from time to time by any legally constituted regulatory body having jurisdiction to require such changes or modifications." Article XII.

The contract also provided in Article II that should the rates be increased "for any reason whatsoever, other than" reasons not here pertinent, Gallup would have the option to terminate the agreement within 90 days (with provision for continued service for a two-year period under the increased rate).

The City urges that nevertheless the contract was a fixed rate agreement something like the one considered in FPC v. Sierra Pacific Power Co., 350 U.S. 348. However, the *Sierra* contract provided only for changes by the California commission, not the then FPC. Here, the provision was much broader. Also, we must agree with the Commission that Article II contemplates other and different changes.

We should again point out that this court in Public Service Co. of N.M. v. FPC, 557 F.2d 227 (10th Cir.), in reviewing a previous order in Docket 9454 affirmed the order which recited that the contract did not provide for unilateral filings under section 205, but that changes be made only upon order of the Commission, thus under section 206. The 206 hearings had then been started, and after some problems culminated in the orders under consideration in this appeal. In the cited case we held there was no reservation in Article XII of the contract to permit unilateral changes by rate filings. It was also there stated that the reference to changes by a "regulatory body" "points toward a change after a §206 proceeding, not a §205 unilateral filing."

In view of our previous opinion in *Public Service Co. of N.M. v. FPC*, it would not seem necessary to discuss in any detail other cases considering the issue. We should mention, however, Louisiana Power & Light v. FERC, 587 F.2d 671 (5th Cir.), where the court held that contract language "subject to amendment or altera-

tion . . . in accordance with a[n] . . . order of any governmental authority" did not create a fixed rate contract. *See also* Southern California Edison Co. v. FPC, 535 F.2d 1325 (D.C. Cir.).

Thus we must hold that the Commission was correct in its application of the "just and reasonable" standard in the section 206 hearing. The Commission in the application of this measure approved the new rate schedule. This was fully supported by the record and was in large part based on data provided by Gallup. This determination was sufficient to establish the new rates under the Commission's statutory authority and under its regulations. There is no validity to the contention by the City of Gallup that there must be a finding or determination directed to the old schedule. Furthermore, Gallup had a full and complete hearing on all relevant issues during the course of these extended proceedings.

As a separate issue Gallup urges that the new rate schedule is so high that it, as a purchaser for resale, cannot compete with PNM for retail customers. This "price squeeze" issue is a matter the FERC should consider where the elements are found to be present. The Supreme Court so held in FPC v. Conway Corp., 426 U.S. 271. The question whether or not this issue was presented was fully considered by the Administrative Law Judge and he concluded that the City made no showing to support a claim of a price squeeze. It is sufficient to point out that there was no evidence of competition at the retail level, and no showing that the rate schedule here considered for the period in which it was to become applicable was higher than PNM retail rates. The claim of Gallup must fail by reason of a failure of proof as to the elements of the doctrine, and a failure to show or even suggust a substantial difference in cost of service for the

relevant period. We find no error as Gallup urges in the selection of a "test" year for this point.

We must hold that the Administrative Law Judge's determination and the Commission holding as to the price squeeze contention were correct. The proof did not really raise the issue, and it was incumbent on petitioner to develop the facts to at least show as a basis that there was a substantial difference in cost of service or strong reasons to indicate such a difference.

Cases 78-2007, 79-1275, 79-1276

We hold that the Commission orders reviewed in these three cases are valid in all respects except only insofar as the orders of the FERC in Docket No. E-9454 (here Case No. 78-2007) dated July 5, 1978 and December 15, 1978 require Public Service Company of New Mexico to file under its regulations, section 35.14(a)(7), the coal contract between the Public Service Company and Western Coal Company. With this exception the orders are valid and enforceable.

APPENDIX B

SEPTEMBER TERM – October 21, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

THE CITY OF GALLUP,
NEW MEXICO,

Petitioners,

vs.

FEDERAL ENERGY
REGULATORY COMMISSION,

Respondent,

No. 79-1275
and
No. 79-1276

PUBLIC SERVICE COMPANY
OF NEW MEXICO,

Intervenor.

This matter comes on for consideration of petitioners' petition for rehearing and suggestion for rehearing en banc in the captioned causes.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the cases were argued and submitted.

The petition for rehearing having been denied by the panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

APPENDIX C

PUBLIC SERVICE COMPANY OF NEW MEXICO, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent,

City of Gallup, New Mexico, Intervenor.

CITY OF GALLUP, NEW MEXICO, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent,

Public Service Company of New Mexico, Intervenor.

Nos. 75-1692, 76-1013.

United States Court of Appeals, Tenth Circuit.

Argued and Submitted May 17, 1976.

Decided June 16, 1977.

Before SETH and HOLLOWAY, Circuit Judges, and STANLEY, Senior District Judge.*

HOLLOWAY, Circuit Judge.

In these consolidated cases petitioners Public Service Company of New Mexico (PNM), an electric utility regulated under the Federal Power Act, 16 U.S.C. § 791a *et seq.* (1970), and the City of Gallup, New Mexico

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*Of the District of Kansas, sitting by designation.

(Gallup), seek review of two Federal Power Commission orders with respect to a change in rate sought by PNM for electricity sold to Gallup.

Gallup is a wholesale purchaser of electricity which it uses and also distributes to customers. The electric power is purchased by Gallup under a contract made with PNM in 1962 for a 25 year term and amended in 1968 to run for 25 years from that date. It contained provisions for payment at a monthly rate based on a "Monthly Demand Charge" plus a "Monthly Energy Charge," *inter alia*, with provisions for fuel cost and tax adjustments. In addition to these provisions containing references to specific rates, Articles II and XII included other provisions relating to changes in rates which are at the center of this controversy.

Article II contained a paragraph entitled "Change in Rate" which included an option for Gallup to terminate the agreement within 90 days after being given notice of a rate increase ". . . should the rates charged herein to the Consumer by the Company be increased for any reason whatsoever other than fuel cost or tax adjustments . . ." Article XII stated that the contract, including the tariff made a part thereof, was subject to "such changes or modifications as shall be ordered from time to time by any legally constituted regulatory body having jurisdiction to require such changes or modifications."

In 1975, PNM filed with the Federal Power Commission a unilateral increase in the rates to be charged to Gallup, pursuant to §205 of the Federal Power Act, 16 U.S.C. §824d (1970). Gallup protested and moved that the Commission reject the filing as violative of an existing fixed rate contract. The Commission found that the agreement did not permit such a unilateral filing. However, the Commission did institute proceedings to deter-

mine a just and reasonable rate pursuant to §206 of the Act, 16 U.S.C. §824e (1970), stating that materials contained in the original PNM filing would form the basis of those proceedings.[1]

In No. 75-1692, PNM contends that the Commission erred in holding that the contract barred PNM's unilateral rate increase filing while Gallup agrees with that part of the Commission's decision.

However, Gallup contends in No. 76-1013 that the Commission erred in stating that the heavy *Sierra-Mobile*[2] burden of proof for relief from an unreasonably low and unlawful rate would not apply in the §206(a) proceeding instituted by the Commission.[3] The Commis-

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[1]The orders challenged were entered in Docket No. E-9454, Public Service Company of New Mexico. On July 31, 1975, the Commission's original ruling was made rejecting PNM's unilateral filing and instituting proceedings to determine a just and reasonable rate. On September 26, 1975, the second order under attack was issued, denying rehearing and further discussing the issues.

PNM filed its petition for review of the two Commission orders in this court. On the same day, Gallup petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the same Commission orders. PNM petitioned to intervene in that case and moved its transfer to this Circuit. PNM's petition to intervene was granted. The District of Columbia Circuit transferred Gallup's petition for review to this Court pursuant to 28 U.S.C. §2112(a) (1970), citing *Abourezk v. FPC*, 168 U.S. App. D.C. 246, 513 F.2d 504, 505. This Court then consolidated the cases.

[2]*See United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373; and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 76 S.Ct. 368, 100 L.Ed. 388.

[3]The Commission stated that it would institute a §206(a) proceeding and set the just and reasonable rate for PNM's service to Gallup and that the proceeding "would not entail meeting the heavy burden of proof associated with the *Mobile-Sierra* decisions."

[footnote continued]

sion argues that this court has no jurisdiction of Gallup's petition. It says that Gallup is not "aggrieved" within the meaning of §313(b) of the Federal Power Act, 16 U.S.C. §825l(b) (1970), since no change in the rates to Gallup has been ordered. Further the Commission and PNM contend that the Commission is right in saying that the heavier *Sierra-Mobile* standard of proof required to set aside a contract rate does not apply because the PNM/Gallup contract, unlike those involved in *Mobile* and *Sierra*, is not a fixed rate contract.

The primary guidelines for our consideration of these petitions are the Supreme Court's opinions in the *Sierra* and *Mobile* cases and their sequal, *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed.2d 153. We need not recount their familiar principles in detail. It suffices to note the summary in *Richmond Power & Light v. FPC*, 156 U.S. App. D.C. 315, 481 F.2d 490, 493, 497, cert. denied, 414 U.S. 1068, 94 S.Ct. 578, 38 L.Ed.2d 472:

> The rule of *Sierra, Mobile* and *Memphis* is refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid.

* * * * * *

In *Sierra* the Court held that although a contract for a fixed term at a fixed rate was involved so that a unilateral filing could not effect a change in rate, under the Federal Power Act the Commission could have a hearing to determine "whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." 350 U.S. at 355, 76 S.Ct. at 372.

> . . . These principles apply whether the parties agree to a specific rate or whether they agree to a rate changeable in a specific manner. In either case the contract is binding, and a unilateral filing is ineffective to change it . . .

I

PNM's Petition for Review

A

PNM argues vigorously for its right to file a unilateral increase in rates on the basis of the following "Change in Rate" provision which appears in Article II of the contract (J.A. 2, 13)[4]:

> *Chance in Rate:*
>
> Not withstanding the earliest effective date of termination (July 1, 1977) as set forth in Article II (Term) above, *should the rates charged herein to the Consumer by the Company be increased for any reason whatsoever other than fuel cost or tax adjustments provided for herein, then and in that event, the Consumer shall immediately have the option within ninety (90) days after the Consumer is given notice of such rate increase to terminate this agreement;* provided, however, that the Company will supply for a two (2) year period thereafter such power and energy in accordance with the new or increased rates as may be requested by Consumer from time to time up to the amount specified in Article IV hereof. The consumer may exercise this option by giving the Company written notice of such termination and paying the Company the sum of One Hundred Dollars ($100) by good and suffi-

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[4]Our references to the record will be made by citing the Joint Appendix as "J.A.".

> cient check of the Consumer. Such notice and payment shall be given by the Consumer by mailing such notice and payment to the Company by certified mail addressed to the Company at its offices in Albuquerque, New Mexico. Such notice shall have incorporated therein a true copy of the resolution duly adopted at a regular meeting of the City Council authorizing such notice and payment, and the notice shall be executed by the Mayor and sealed and attested by the City Clerk. (Emphasis added).

PNM's position is that the language emphasized above can only be read as giving PNM the right to file a unilateral rate change. PNM's brief argues that since the paragraph gives Gallup an opportunity to terminate the contract "should [PNM] change its rates 'for any reason whatsoever,' "[5] it is apparent that the contract gives PNM the right to change the rates unilaterally. Brief of Petitioner, PNM, 6.[6]

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[5]We note that the contract does not contain wording that directly supports PNM's statement that the contract "provides Gallup with an opportunity to terminate the contract *should the company [PNM] change its rates* 'for any reason whatsoever.' " Brief of Petitioner, PNM, 6. (Emphasis added). Article II stipulates that ". . . *should the rates* charged herein to the Consumer [Gallup] by the Company [PNM] *be increased for any reason whatsoever other than fuel cost or tax adjustments*. . . ," then Gallup has the termination option. (J.A. 2) (Emphasis added).

[6]A broader interpretation of the contract language in the change in rate paragraph of Article II is also made by PNM in its reply brief, p. 16:

> In summary, Article II of the PNM/Gallup contract evidences a contractual contemplation of rate change powers both in the regulatory agency which oversees the contract and by the unilateral action of the seller under the contract . . .

When confronted with PNM's arguments the Commission said (J.A. 121; see also J.A. 146):

> We do not think that this language goes to the *Mobile-Sierra* issue of whether the contract permits the selling public utility to unilaterally file for an increase in rates, but rather provides an option to the customer if the rates charged to it are increased for any reason.

We must agree with the Commission's conclusion. Although the "Change in Rate" paragraph does recognize that a change in rates may occur, it does not say how such a change may be effected.[7] Nonetheless, PNM offers several arguments in support of its position.

First, PNM asserts that if this paragraph did not contemplate a unilateral rate change by PNM, Gallup's option to terminate would be meaningless. In response to this contention the Commission noted that the option could be exercised when a §206 proceeding (to determine a just and reasonable rate) resulted in a rate increase. PNM replies that a customer does not need the option when it has the opportunity to participate in a §206 hearing on a just and reasonable rate. We agree with the Commission that there is nothing illogical about a customer's desire to retain an option to terminate after a §206 proceeding, especially if the customer's position is not accepted by the Commission and the customer is then faced with increased rates.

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[7] Article II as a whole deals with the term of the contract and with two options to terminate—the first for any or no reason upon 24 (amended to 48) months' notice under the title "Term" but no earlier than December 31, 1967 (amended to July 1, 1977), and the second only upon a change in rates after three months' notice under the title "Change in Rate".

Second, PNM argues that the "notice of such rate increase" language in the "Change in Rate" paragraph can only have reference to §205 unilateral filing procedures which are instituted by notice. The Commission thought that the phrase did not refer to §205, but rather was used "in the ordinary meaning of notice under contract law". J.A. 149. We agree with the Commission that the tenor of Article II is such that the word "notice" seems to be used in the more general sense.

PNM further argues that even if the term "notice" was intended to be used in this way, the duty to give notice implies a power to act unilaterally. However, this argument assumes that the notice of a change in rate is to be given by PNM, an assumption unsupported by the contract language.[8] The notice referred to in the "Change in Rate" paragraph could just as well be notice from the Commission that the rate has been increased after a §206 hearing. Thus the notice clause does not single out a party to give notice or indicate a particular change in rate procedure.

In support of its proposition that Gallup's option to terminate in the face of increased rates implies the countervailing right of PNM to file unilateral rate increases, PNM cites two orders of the Commission in Arkansas-Missouri Power Co., Doc. No. E-9094.[9] We are

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[8]It is worth noting that Gallup's duty to give notice on termination of the contract under either paragraph two or paragraph three of Article II is spelled out in detail. See J.A. 2-3, 12-13.

[9]The Commission language mainly relied on in Arkansas-Missouri appeared in an order of November 29, 1974, stating in part:

> . . . It seems highly unlikely that the parties would have contemplated only mutually agreed upon amendments (rate

[footnote continued]

persuaded, however, that the Commission has logically distinguished the contract before us from that involved in the Arkansas-Missouri case. The contractual language there was broader, as the Commission says, and evinced an intent to permit unilateral filings under §205, an intent not shown by Articles II and XII of the PNM/Gallup contract.

In sum, we agree with the Commission that the "Change in Rate" paragraph in the contract did not give or imply a right in PNM to make the unilateral rate filing.

B

PNM also claims a right to unilaterally file an increased rate on the basis of Article XII of the contract.[10] PNM says that this part of the agreement should be construed in light of the procedures of the New Mexico Public Service Commission because it is a verbatim copy of a tariff provision required by the New Mexico Commission for companies subject to its jurisdiction. PNM claims that

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changes) to the contract on the one hand, and provided for an option to cancel in the event of such a change on the other.

* * * * *

The second order relied on by PNM was the order of January 29, 1975, denying rehearing.

[10]Amended paragraph one of Article XII reads as follows (J.A. 22):

> This contract, including the tariff made a part hereof, shall at all times be subject to such changes or modifications as shall be ordered from time to time by any legally constituted regulatory body having jurisdiction to require such changes or modifications.

As originally drawn, Article XII contained a proviso that the agreement was subject to changes or modifications by the New Mexico Public Service Commission.

New Mexico law permits unilateral filings and that, therefore, PNM had the right under this contract.[11]

We are not persuaded. State law and procedure are relevant only to the extent intended by the parties. *Appalachian Power Co. v. FPC*, 174 U.S. App. D.C. 100, 529 F.2d 342, 347 n. 35, cert. denied, 429 U.S. 816, 97 S.Ct. 58, 50 L.Ed.2d 76. We are convinced that an intent to incorporate state law is not manifested by Article XII. Compare *Richmond Power & Light Co. v. FPC, supra,* 156 U.S. App. D.C. 315, 481 F.2d at 499-500. Thus it is unnecessary for us to examine New Mexico law in deciding whether PNM reserved a right to make unilateral rate filings.

C

One major argument by PNM in support of its claim of a right to make unilateral rate filings remains. PNM says that provisions like Article XII relating to changes in rate by "orders" (see note 11, *supra*), as construed in *Central Telephone & Utilities Corp., Western Power Division,* 50 F.P.C. 1105 (1973), are consistent with an interpretation that the contract provides for §205 unilateral filings by PNM which may then be made effective by Commission orders.

We must agree that the *Central Telephone* decision, 50 F.P.C. at 1110, supports PNM's position. However, in its order denying rehearing in the instant case the Commis-

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[11]PNM states that the provision is prescribed by Section 24 of the New Mexico Commission's Tariff Schedule Rules, promulgated by First Revised General Order No. 2, effective December 15, 1965. The above cited order is not a part of our record. However, Gallup and the Commission do not contest this point, although they do not concede the conclusion drawn from it by PNM to the effect that state law was incorporated by the parties.

sion responded that the *Central Telephone* language was contrary to that of the Supreme Court in *Mobile*, that it was dictum, and that more recent Commission decisions have interpreted the term "order" in the same manner as it was construed here. We need go no further than the first point. We agree that the language of *Mobile* supports the Commission's position in this case which was stated as follows (J.A. 122):

> . . . We think that the key language in the clause at issue is that the rate shall be subject to change by order issued by the regulatory body having jurisdiction, which is this Commission. In the *Mobile* case, the Court stated in reference to Section 4(d) of the Natural Gas Act, which is equivalent to Section 205(d) of the Federal Power Act:
>
> > Section 4(d) provides not for the filing of 'proposals' but for notice to the Commission of any 'change . . . made by' a natural gas company, *and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. Mobile, supra,* [350 U.S.] at 342 [76 S.Ct 373] (emphasis supplied)
>
> Since the parties provided for a change in rate only by order issued by the Commission, it is clear they did not contemplate the unilateral filings permitted by Section 205.

In the final analysis, the question is whether the contract reserved to PNM the right to increase the specified rates by a unilateral filing. See *Memphis, supra,* 358 U.S. at 114, 79 S.Ct. 194. We find no such reservation in the Article XII provision on contract modification by regulatory orders. Indeed the reference therein to changes ordered by a regulatory body ". . . having jurisdiction to *require* such changes . . ." (emphasis added),

points toward a change after a §206 proceeding, not a §205 unilateral filing. We feel the parties would not have left the reservation of an important right such as the making of unilateral rate changes to implication from provisions like those of Article XII, or of Article II, but would have clearly provided for such filings if they had been intended.

II

Gallup's Petition for Review

In No. 76-1013, Gallup argues that the Commission erred in holding that PNM would not have to satisfy the heavy *Sierra-Mobile* burden of proof in the §206 proceeding instituted by the Commission. The Commission contends that this court lacks jurisdiction of Gallup's petition because Gallup is not presently "aggrieved" within the meaning of §313(b) of the Federal Power Act, 16 U.S.C. §825*l*(b) (1970), since there has been no change in the rates that Gallup must pay for wholesale electric service. The Commission further says that the earliest point at which Gallup could be aggrieved would be after the conclusion of the §206 proceeding. Hence the Commission suggests that Gallup's petition is premature and should be dismissed without prejudice. We agree.

Section 313(b) of the Act, 16 U.S.C. §825*l*(b) (1970), provides in part:

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals. . . .

This provision does not authorize review of orders of a procedural or interlocutory nature, but rather relates to "orders of a definitive character dealing with the merits

of a proceeding before the Commission". *FPC v. Metropolitan Edison Co.*, 304 U.S. 375, 384-85, 58 S.Ct. 963, 967, 82 L.Ed. 1408; *Amerada Petroleum Corp. v. FPC*, 285 F.2d 737, 739 (10th Cir.). The requirement that a reviewable order be "definitive" is something more than a requirement that it be unambiguous in legal effect. *Atlanta Gas Light Co. v. FPC*, 476 F.2d 142, 147 (5th Cir.). It is a requirement that the order have some substantial effect on the parties which cannot be altered by subsequent administrative action. Id. To be reviewable the order must have an impact upon rights and be of such a nature that it will cause irreparable injury if not challenged. *Amerada Petroleum Corp., supra*, 285 F.2d at 739.

We are not persuaded that Gallup has shown that it is "aggrieved." The Commission's orders with respect to Gallup were preliminary in that they merely initiated the §206 proceeding and were procedural insofar as they defined the burden of proof for that proceeding. The contract rates between PNM and Gallup were not modified and, in fact, until they are modified there can be no real injury to Gallup.[12] See *Amerada Petroleum Corp., supra*, 285 F.2d at 740. Further, Gallup's claim that the ongoing §206 proceeding could be a "nullity" if the wrong burden of proof is used, thus causing the parties

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[12]Gallup states that the Commission's orders were based on the premise that the City was an "aggrieved" party since the Commission accepted and granted the City's petition for intervention. We are not bound by the Commission's order granting petitioner's motion to intervene. *Utility User's League v. FPC*, 394 F.2d 16, 19 (7th Cir.), cert. denied, 393 U.S. 953, 89 S.Ct. 377, 21 L.Ed.2d 365. Rather, this court is obligated to determine for itself whether it has jurisdiction. *Phillips Petroleum Co. v. FPC*, 475 F.2d 842, 845 (10th Cir.). cert. denied. 414 U.S. 1146, 94 S.Ct. 901, 39 L.Ed.2d 102.

wasted time and resources, is insufficient to show aggrievement. *Colorado Interstate Gas Co. v. FPC,* 370 F.2d 777, 781 (10th Cir.); see *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 51-52, 58 S.Ct. 459, 82 L.Ed. 638.

Accordingly in No. 75-1692, the orders of the Commission are affirmed. In No. 76-1013, the petition of Gallup is dismissed without prejudice.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ELECTRIC RATES:

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr., and George R. Hall.

Public Service Company of New Mexico	))	Docket Nos. ER78-337 and ER78-338

ORDER GRANTING AND DENYING MOTIONS, ACCEPTING AND CONDITIONALLY ACCEPTING RATE INCREASES FOR FILING, SUSPENDING RATE INCREASES, ESTABLISHING 205 AND 206(a) PROCEEDINGS, ESTABLISHING PRICE SQUEEZE PROCEDURES, GRANTING INTERVENTIONS AND ESTABLISHING ADDITIONAL PROCEDURES

(Issued June 30, 1978)

On April 21, 1978, the Public Service Company of New Mexico (PNM) tendered for filing three rate increase proposals. The first filing, assigned Docket No. ER78-337, was tendered pursuant to Section 205 of the Federal Power Act and contained two separate rate increase proposals for the following wholesale customers of PNM: Community Public Service Company (CPS); Plains Electric Generation and Transmission Cooperative, Inc. (Plains); Department of Energy—Los Alamos (DOE) and the City of Farmington, New Mexico (Farmington). The third rate increase proposal, assigned Docket No. ER78-338, was tendered pursuant to Section 206 of the

Federal Power Act[1] and contained a proposed increase in rates to the City of Gallup, New Mexico (Gallup).

Notices of the proposed changes in rates for Docket Nos. ER78-337 and ER78-338 were issued on May 5, 1978, with all protests and petitions to intervene due on or before June 19, 1978.[2]

Partial CWIP-Based Rates

The first set of rates tendered in ER78-337 for PNM's four wholesale customers include allowable pollution control construction work in progress (CWIP) in rate base,[3] and would increase PNM's revenues in the amount of $4,927,416 (13.81%). The proposed rates contain a power adjustment factor and a special tax assessment as well as modification of the provision for determining the billing demand by deleting the time-of-day (TOD) rate design feature for all wholesale customers, except DOE.[4] PNM has requested waiver of the Commission's[5] notice

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[1]The proposed change in rates for Gallup are filed pursuant to Section 206 in accord with two orders issued by the former FPC in Docket No. E-9454 on July 31 and September 26, 1975, respectively. Therein, the FPC found the existing PNM-Gallup contract did not permit unilateral Section 205 rate increase filings but the contract permitted a change in rate after the completion of a Section 206(a) proceeding.

[2]By notice issued June 12, 1978, the original date for filing, May 12, 1978, was extended in both dockets to June 19, 1978.

[3]As per Order No. 555, Docket No. RM75-13, issued November 6, 1976, 18 CFR 2.16(b).

[4]The 1976 PNM-DOE contract provides for the TOD rate design to be in effect for five years.

[5]The "Commission" when used in the context of an action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

provisions to allow these rates to become effective June 1, 1978.[6]

Total CWIP-Based Rates

The second set of rates tendered in ER78-337 and the rates tendered in ER78-338 for Gallup are based on the inclusion of all CWIP in rate base. Section 35.13 cost support data and testimony were submitted for both of these filings. Total CWIP based rates would increase PNM's revenues for the four wholesale customers in the amount of $13,551,414 (37.99%), and for Gallup in the amount of $3,643,391 (133.52%).

PNM proposes the total CWIP based rates for prospective effect only, in accordance with Order No. 555.[7] In support of the requested inclusion, PNM represents that it is experiencing severe financial difficulty which requires a material increase in the cost of electricity to its resale customers and which cannot otherwise be alleviated without the inclusion of all CWIP in rate base. PNM states it has experienced extraordinary growth and concomitant capital demands and, based on plant in service, it is one of the fastest growing utilities in the country.[8] From 1967 to 1977, CWIP as a percentage of net utility plant in service has increased for PNM from 13% to 78%.[9] PNM's stated primary reason for the request relief

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[6]The request for waiver was made by PNM in the May 30, 1978 response to the Secretary's deficiency letter of May 17, 1978.

[7]In the case of Gallup the prospective effect of the rates rests on a dual basis Order No. 555 and the nature of the PNM-Gallup contract (See, footnote 1).

[8]The resale growth is attributed to population immigration, energy research activities of DOE-Los Alamos and certain mining activities.

[9]PNM states at the end of 1976, electric CWIP constituted $261 million compared to a net electric plant of $310 million. PNM

[footnote continued]

is to enable it to generate internally the cash necessary to support the construction budget required to meet the customers' demands, and enable the Company to continue to finance externally a portion of this construction budget at a reasonable cost.

Petitions to Intervene

Four petitions to intervene have been filed in Docket No. ER78-337 by: the General Services Administration (GSA);[10] CPS;[11] Plains;[12] and Farmington.[13] A motion for leave to file a late intervention and a petition to intervene has been filed in Docket No. ER78-338 by Gallup.[14] All petitioners have attempted to demonstrate that they have a substantial interest in the respective proceedings which cannot be adequately represented by other parties and that their participation would be in the public interest.

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attributes approximately $62 million of 1978 CWIP to the resale customers since the requirements of these customers represent approximately 20% of the system peak demand through 1982.

[10]Filed May 15, 1978. GSA's petition was filed on behalf of the executive agencies of the United States Government; GSA's statutory authorization having been established pursuant to Section 201(a) of the Federal Property and Administrative Services Act of 1949; 40 U.S.C. 481(a).

[11]Filed May 19, 1978. CPS, an electric public utility operating in the States of New Mexico and Texas, is a wholesale customer of PNM.

[12]Filed June 19, 1978. Plains, a wholesale customer of PNM, supplies the full requirements for electric power and energy to its eleven member cooperatives in New Mexico and from time to time sells electric power and energy to the Salt River Project in Arizona, also a member.

[13]Filed June 19, 1978. Farmington owns a municipal electric generation and distribution system and purchases part of its electric requirements from PNM.

[14]Filed June 20, 1978.

Motions

CPS has moved for consolidation[15] of Docket Nos. ER78-337, ER78-338 and ER77-464.[16] With regard to the ER78-337 and 338 consolidation, CPS submits that common questions of law and fact are involved in the two proceedings in that cost determinations and allocations must be resolved on a consistent basis. In support of consolidating ER77-464, CPS contends common questions of law and fact are present as to the TOD rate methodology and that circularity of procedures and duplications of effort would be avoided.[17]

Plains and Farmington have moved for a rejection of the rate filings in ER78-337 and Gallup has moved for a rejection of the rate filings in ER78-338. Plains alleges that rejection of PNM's filing in ER78-337 is warranted on several grounds: (1) the effect of the filing, in which PNM proposes to eliminate the TOD service, constitutes an unlawful termination of service; (2) PNM has failed to file a notice of termination of new service as is required by Section 35.15 of the Commission's Regulations; (3) PNM violated the notice provisions of the power supply contract with Plains by failing to inform and negotiate with Plains at least 30 days prior to filing, and (4) PNM's

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[15]Motion to consolidate ER78-337 and 338 was contained in CPS's May 15, 1978 filing. Motion to consolidate ER77-464 was filed on June 7, 1978. A motion opposing the consolidation of ER77-464 was filed by Plains on June 22, 1978.

[16]Docket No. ER77-464 involves PNM's presently effective rates for CPS, Plains and DOE-Los Alamos. The rates in this docket were accepted for filing and suspended by order issued July 19, 1977. The hearing is scheduled to commence on September 26, 1978.

[17]The factual underpinning for consolidating ER77-464 rests on PNM's current proposal to eliminate the TOD rate structure for all partial requirements customers, except DOE.

filing unlawfully discriminates on its face against Plains because PNM will continue to offer TOD service to DOE—Los Alamos.

In addition to the argument outlined in point 4 above, Gallup and Farmington contend that rejection of the CWIP based rates in both dockets is appropriate inasmuch as an analysis of PNM's filing demonstrates that the Company has failed to meet the threshold level of financial distress contemplated by Order No. 555.

Remaining Issues Raised by the Pleadings

Gallup and Farmington allege that a comparison of PNM's retail rates with the rates proposed for each of them reveals the existence of a price squeeze, the effect of which will seriously impede their efforts to compete with PNM for new industrial customers in New Mexico. Farmington contends that a price squeeze exists both for the partial CWIP based rates and the total CWIP based rates.

Gallup points out that it has already been determined that the contract between itself and PNM bars a unilateral rate increase filing.[18] Gallup requests the Commission to find that PNM must satisfy the *Sierra-Mobile*[19] burden of proof in the ER78-338 proceeding. Should the Commission so find, Gallup submits rejection of PNM's filing is warranted since on its face the filing demonstrates that PNM would be unable to satisfy the *Sierra-Mobile* burden.

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[18]See footnote 1.

[19]*United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S. 322 (1956); *Federal Power Commission v. Sierra Pacific Power Company*, 350 U.S. 348 (1956).

Numerous cost of service issues and allegations of anticompetitive effects have also been raised in the various pleadings.

Analysis

We find rejection of the rates tendered by PNM in both dockets is not warranted on the grounds alleged. The deletion of the TOD rate design feature constitutes a change in rate schedule for which PNM has made the appropriate filing. The allegation that deletion for all wholesale customers except DOE may be discriminatory is an issue which should properly be addressed at hearings. Further, Plains has admitted that the contract between itself and PNM provides for unilateral rate increases; the alleged infraction of the notice provisions does not abrogate that right.

In both filings, we find that PNM has not provided the requisite showing in support of its request for inclusion of all CWIP in rate base. A predicate to relief under Order No. 555 requires, *inter alia*, a showing of severe financial difficulty which cannot otherwise be alleviated without the inclusion of CWIP in rate base. Since the only set of rates tendered for Gallup in ER78-338 are total CWIP-based rates we would be unable to determine whether inclusion of CWIP in rate base will alleviate the Company's alleged severe financial hardship unless PNM refiles revised rates and cost of service data for Gallup reflecting the exclusion of non-allowable CWIP from rate base. Additionally, in order to establish adequate support for both sets of CWIP-based rates, we shall require PNM to file a supplemental case-in-chief addressing, *inter alia*, the relevant considerations outlined in Attachment A, appended to this order.

Subject to the condition that PNM refile revised rates for Gallup and the supplemental case-in-chief we believe

that PNM should be afforded the opportunity to go to hearing on the CWIP issue. Common questions of law and fact are present in both dockets. Therefore, we shall consolidate Dockets No. ER78-337 and 338. Differing test years and the advanced stage of the proceedings in ER77-464 make consolidation of this docket with ER78-337 and 338 impracticable. The request for ER77-464 consolidation shall be denied.

In order to expedite the consolidated proceedings we shall establish a phasing procedure.[20] Phase I will deal with the issue of CWIP in rate base and the allowable rate of return. Phase II will commence after a final order on rehearing has been issued in Phase I and will deal with all remaining issues.

The inclusion of CWIP in rate base under the severe financial difficulty exception can only be granted prospectively from a final order of the Commission on rehearing. Therefore, the only rates which shall go into effect, subject to refund, as will be further discussed, are the partial CWIP-based rates in Docket No. ER78-337. In accord with Section 2.16(b) upon the issuance of a final Commission decision on rehearing in Phase I of the consolidated proceedings approving the inclusion of some or all of CWIP in rate base, PNM will be directed to proffer a compliance filing under Section 205 for Docket No. ER78-337 and under Section 206 for Docket No. ER78-338.

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[20]By motion filed June 22, 1978, PNM requested an expedited phased proceeding. The phasing process to be established will provide the relief PNM requests; should inclusion of some or all of CWIP in rate base be approved by final order on rehearing in Phase I, compliance rates in ER78-337 will be allowed to become effective, subject to refund.

The consolidated proceedings shall be instituted under both Section 205 and 206(a) of the Federal Power Act. With regard to the partial CWIP based rates in ER78-337, PNM has requested waiver of our notice requirements. Good cause has not been shown to grant such waiver. PNM's filing as originally tendered did not meet the requirements of Section 35.13(b)(4)(iii),[21] and did not provide us with the necessary information from which we could reach an informed and equitable decision as to the necessity for a hearing or the appropriate length of suspension. The requisite information was not received until May 31, 1978. We find that these rates have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful. Accordingly, the ER78-337 partial CWIP based rates shall be accepted for filing as of June 30, 1978 and suspended for five months until December 1, 1978, at which time they shall become effective subject to refund. The total CWIP based rates in ER78-337 are conditionally accepted for filing and their use deferred as has been hereinbefore described.

We shall conditionally accept PNM's filing in ER78-338 pending the filing of appropriately revised rates and cost of service data reflecting the exclusion of non-allowable CWIP from rate base. Upon receipt of the revised rates we shall accept the rates for filing and defer their effectiveness pending hearing and final Commission order at the conclusion of Phase II of the consolidated proceedings.

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[21]By Secretary letter issued May 17, 1978, PNM was notified that the proposed filings in both dockets were deficient and that a filing date would not be assigned until the enumerated deficiencies were cured. In response, PNM submitted further material on May 30 and May 31, respectively.

In a prior docket involving the PNM–Gallup contract it has already been determined that PNM is not required to meet the heavy burden of proof associated with the *Sierra-Mobile* decisions in order to effect a change in rates to Gallup.[22] Gallup's request for such a finding and motion to reject shall be denied.

Allegations of "price squeeze" have been raised. To conform with Order No. 563, additional procedures must be set to effectuate the policy announced in that order. The Administrative Law Judge is hereby granted the discretion to determine if the price squeeze issue should be heard in Phase I or Phase II of the consolidated proceedings.

Participation by all intervenors may be in the public interest.

The Commission finds:

(1) Good cause exists to deny Plains', Farmington's and Gallup's motions to reject.

(2) Good cause has not been demonstrated to justify waiver of the Commission's notice requirements.

(3) Good cause exists to require PNM to file revised rates and cost of service data based on the exclusion of non-allowable CWIP in rate base in Docket No. ER78-338.

(4) Good cause exists to require PNM to file a supplemental case-in-chief in response to the relevant considerations outlined in Attachment A of this order for the total CWIP rates in both Docket Nos. ER78-337 and 338.

(5) Good cause exists to conditionally accept for filing the proposed rates in ER78-338 (to be revised by the

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[22]Orders of July 31 and September 26, 1975, *Public Service Company of New Mexico*, Docket No. E-9454.

requirements of Section 2 and Section 3 above) and to defer their effectiveness as shall be hereinafter ordered.

(6) Good cause exists to conditionally accept for filing the total CWIP rates in ER78-337 (to be supplemented by the requirements of Section 4 above) and to defer their effectiveness as shall be hereinafter ordered.

(7) Good cause exists to accept for filing the proposed partial CWIP rates in ER78-337 and to suspend the same for five months until December 1, 1978 when they shall become effective, subject to refund as hereinafter ordered.

(8) It is necessary and proper and in the public interest and to aid in the enforcement of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of PNM's rates in Docket Nos. ER78-337 and 338, as proposed to be revised and supplemented herein.

(9) Good cause exists to grant CPS's motion to consolidate Docket Nos. ER38-337 and 338 for purposes of hearing.

(10) Good cause exists to deny CPS's motion to consolidate Docket No. ER77-464 with Docket Nos. ER78-337 and ER78-338.

(11) Good cause exists to establish additional procedures for the consolidated proceedings.

(12) Good cause exists to establish price squeeze procedures to effectuate the policy announced in Order No. 563.

(13) Participation by GSA, CPS, Plains, Farmington and Gallup may be in the public interest.

The Commission orders:

(A) Plains', Farmington's and Gallup's motions to reject are hereby denied.

(B) PNM's request for waiver of the Commission's notice requirements is hereby denied.

(C) Within 60 days from the date of this order, PNM shall file revised rates and cost of service data reflecting the elimination of non-allowable CWIP in rate base in Docket No. ER78-338.

(D) That PNM be required, within 60 days of the issuance of this order, to file its full case-in-chief with respect to its application to include CWIP in rate base under the financial hardship criteria of Order No. 555, including material responding to considerations enumerated in Attachment A.

(E) Pursuant to the authority of the Federal Power Act, particularly Sections 205 and 206(a) thereof, and the Commission's Rules and Regulations, a public hearing shall be held concerning the justness and reasonableness of the rates and charges included in the subject filings of PNM as proposed to be revised herein.

(F) CPS's motion to consolidate Docket Nos. ER78-337 and ER78-338 is hereby granted.

(G) CPS's motion to consolidate Docket No. ER77-464 with ER78-337 and ER78-338 is hereby denied.

(H) The Administrative Law Judge is hereby directed to establish additional procedures for the consolidated proceedings in accordance with the phasing process detailed in this order.

(I) Pending such a hearing and decision thereon, the proposed partial CWIP based rates in Docket No. ER78-337 are accepted for filing and suspended for five months

to become effective on December 1, 1978, subject to refund.

(J) Pending a hearing and decision thereon, the total CWIP based rates in Docket Nos. ER78-337 and 338 are hereby *conditionally accepted* for filing subject to the conditions of paragraphs (C) and (D) above. The effectiveness of the ER78-337 filings shall be deferred until a Commission order on rehearing approving such rates is issued in Phase I and the effectiveness of the ER78-338 rates shall be deferred until a final order approving such rates is issued by the Commission at the completion of Phase II.

(K) Petitioners, GSA, CPS, Plains, Farmington and Gallup are hereby permitted to intervene in the consolidated proceedings subject to the Rules and Regulations of the Commission: *Provided, however,* that participation of such intervenors shall be limited to the matters affecting asserted rights and interests specifically set forth in the petition to intervene; and *Provided, further,* that the admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved by any orders entered in this proceeding.

(L) The Administrative Laws Judge shall convene a prehearing conference within 15 days of the date of issuance of this order, for the purpose of hearing intervenors' request for data required to present their case, including a *prima facie* showing, on the price squeeze issue.

(M) The Administrative Law Judge is hereby granted the discretion to establish all additional dates and procedures to be followed for the phased, consolidated proceedings including the determination of whether the price squeeze issue should be heard in Phase I or Phase II.

(N) The Secretary shall cause the prompt publication of this order to be made in the Federal Register.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Georgiana Sheldon, Acting Chairman; Matthew Holden, Jr., and George R. Hall.

Public Service Company of New Mexico — Docket Nos. ER78-337 and ER78-338

ORDER ON REHEARING DENYING REQUESTED RELIEF

(Issued December 15, 1978)

By order issued August 28, 1978, the Commission[1] granted a rehearing of that portion of the June 30, 1978, order in these dockets pertaining to the burden of proof which must be met by Public Service Company of New Mexico (PNM) to effect a change in rates to the City of Gallup, New Mexico (Gallup). In the June 30 Order establishing Section 206(a) proceedings for the proposed rate increase to Gallup in Docket No. ER78-338, the Commission stated:

> In a prior docket involving the PNM-Gallup contract it has already been determined that PNM is not required to meet the heavy burden of proof associated with the Sierra-Mobile decisions in order to effect a change in rates to Gallup[22]

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[22]Orders of July 31 and September 26, 1975, *Public Service Company of New Mexico*, Docket No. E-9454. (mimeo at 7.)

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[1]The "Commission" when used in the context of an action taken prior to October 1, 1977 refers to the FPC; when used otherwise, the reference is to the FERC.

For reasons that will be set forth herein, we find that Gallup has presented no facts or principles of law that warrant a modification of our June 30, 1978 order. The FPC's holding in Docket No. E-9454 is reaffirmed.[2] Gallup's request for relief shall be denied.

On rehearing, Gallup alleges that "new" material is now before this Commission which was not before the FPC at the time that its decision was rendered in Docket No. E-9454. The "new" material to which Gallup alludes is paragraph 12 of the 1948 Sierra-Pacific contract which was the subject of *F.P.C. v. Sierra-Pacific Power Company*, 350 U.S. 348 (1956). Paragraph 12 in its entirety reads as follows:

> This agreement shall become effective as of January 1, 1948, upon procurement of an order by the Public Utilities Commission of the State of California authorizing the parties hereto to carry out the terms and conditions hereof. This agreement shall at all times be subject to such changes and/or modifications as said Commission may from time to time direct in the exercise of its jurisdiction.

Gallup juxtaposes this language against Article XII of the PNM-Gallup contract language which provides:

> This contract, including the tariff made a part hereof, shall at all times be subject to such changes

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[2]The PNM-Gallup contract in Docket No. E-9454 is the same contract under consideration in this docket. The FPC's interpretation of this contract as requiring a Section 206(a) proceeding to effect a change was affirmed in *Public Service Company of New Mexico v. F.P.C.*, 557 F.2d 227 (10th Cir. 1977). The Court dismissed Gallup's claim that the heavier *Sierra-Mobile* burden of proof should apply because the FPC's order was interlocutory in nature and thus nonreviewable until the completion of the proceedings.

> or modifications as shall be ordered from time to time by any legally constituted regulatory body having jurisdiction to require such change or modifications.

Gallup states that these are "parallel" contractual provisions which provide for "regulatory change at Commission initiative" and that on the basis of such language the Supreme Court in *Sierra, supra,* articulated a heavier burden of proof which must be met to effect a change.

In response,[3] PNM submits that the two contracts differ significantly. First, PNM states that paragraph 12 of the *Sierra* contract provided that the terms of the contract in general shall be subject to regulatory modification, whereas the PNM-Gallup contract provides not only that the contract but the tariff itself would be subject to modification by order of a regulatory body.[4] Second, PNM points out that the Commission referred to in the *Sierra* contract was the California Commission. The agreement was subject only to such modification as directed by that Commission and there was no provision for modification of the agreement by order of the Federal Power Commission. PNM contends that this stands in contrast to the PNM-Gallup contract which provides for modification of the rates by order of "any legally constituted regulatory body having jurisdiction to require such changes or modifications." PNM submits that jurisdiction over the PNM-Gallup contract lies with the FERC and a change in rates by order of this

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[3] Filed pursuant to Section 1.34(d) on September 13, 1978, as provided in the August 28, 1978 order.

[4] We note that the Sierra-Pacific contract also contained the agreed upon rates. Therefore, PNM's distinction on this basis is unpersuasive.

Commission after a Section 206 proceeding is consistent with the language of the contract.

PNM also refers to two other provisions in the PNM-Gallup contract which have no equivalent in the *Sierra* contract. These provisions deal with Gallup's option to terminate the contract.[5] PNM submits that Gallup's additional right to terminate the contract demonstrates that the parties contemplated an increase in rates by methods other than those already available. In other words, if the only method of change available to PNM was through a Section 206 proceeding involving the heavy *Sierra-Mobile* burden, then Gallup's additional right to terminate the contract would be superfluous.

We find Gallup's argument that the similarity in contract language between the *Sierra* contract and the PNM-Gallup contract requires the imposition of the heavier *Sierra-Mobile* burden of proof to be only superficially appealing. The Supreme Court's decision in *Sierra* must be read together with *Mobile*,[6] *Memphis*,[7] and subsequent federal court decisions which have led to refinement of Commission analysis of *Sierra-Mobile* contracts.

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[5]The provisions to which PNM refers are contained in Article II of the PNM-Gallup contract. The first cancellation provision appears under the Section entitled "Terms" and provides an option for Gallup (but not PNM) to terminate the Contract upon 48 months notice. The additional cancellation provision appears in the Section entitled "Change in Rates" and provides Gallup an option to cancel within 90 days of any rate increase (other than increases for fuel costs or tax adjustments).

[6]*United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[7]*United Gas Pipeline Co. v. Memphis Light Gas & Water Division*, 358 U.S. 103 (1958).

As a starting point, the clear import of the *Mobile* case is that the relations between a utility and its customers may be established by contract and that Section 4(d) of the Natural Gas Act, (which is equivalent to Section 205(d) of the Federal Power Act) does not provide a mechanism for abrogating the terms of the contract. Instead, as the Court stated:

> Section 4(d) on its face indicates no more than that otherwise valid changes cannot be put in effect without the required notice to the Commission. To find in the Section a further purpose to empower natural gas companies to change their contracts unilaterally requires reading into it language that is neither there nor reasonably to be implied. (350 U.S. at 340, 341)

This principle was reaffirmed in *Sierra*, where the Court went on to clarify the standard under which the Commission could relieve a utility of an improvident bargain struck in a fixed-rate contract.[8]

Subsequently in *Memphis* the Court affirmed the Commission's interpretation of a contract as one which permitted unilateral rate increase filings. In distinguishing *Mobile*—the Court stated:

> The important and indeed decisive difference between this case and *Mobile* is that in *Mobile* one

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[8] Establishing what has come to be referred to as the *Sierra-Mobile* burden the Court stated:

> In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. (350 U.S. at 355.)

party to the contract was asserting that the Natural Gas Act somehow gave it the right unilaterally to abrogate its contractual undertaking, whereas here the petitioner seeks simply to assert, in accordance with the procedures specified by the Act, *rights expressly reserved to it by contract* (358 U.S. at 112, emphasis added).

These cases make it clear that the initial point of Commission inquiry is to establish whether the parties agreed contractually to a specific rate or whether they agreed to a rate changeable in a specific manner.[9] The importance of contractual interpretation has been re-emphasized by a recent case which held that the parties may not only extend the protection of their contract to the mechanics of a rate change but also to the effective date of the change.[10]

With this review of controlling precedents we analyze Gallup's argument. Because the contract does not appear in the text of the opinion in *Sierra*, we have no basis for inferring that the Court's conclusion on the fixed rate nature of the contract derives from the fact that the rates could only be changed by Commission direction. An equally plausible conclusion would be the one proffered by PNM; that because the *Sierra* contract specified that rate changes could only be effected by direction of the California Commission, the parties specifically did not provide for rate changes by the FPC.

Upon review of the PNM-Gallup contract, we find the FPC properly interpreted the contract as one which

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[9] *Richmond Power and Light, v. FPC*, 481 F.2d 490, at 497 (D.C. Cir. 1973).

[10] *City of Kaukauna v. FERC*, Docket No. ER76-1561, (D.C. Cir.) July 24, 1978.

rovided for change in a specified manner. The FPC focused on the clause in the PNM-Gallup contract which provides that the rate shall be subject to change by order issued by the regulatory body having jurisdiction. As the FPC noted, this clause clearly indicated that the parties did not intend to allow a change in rates by unilateral filings under Section 205, but only by "order" of the Commission, i.e. a change in rates prospectively after a Section 206(a) proceeding.[11] Since the parties have prescribed a method for changing the rates there would be no need for the Commission to act under the overriding public interest standard enunciated in *Sierra* which only applies where the parties do not provide for any change in rates. Therefore, the *Sierra-Mobile* burden of proof does not apply to these proceedings. Gallup's petition for rehearing shall be denied.

The Commission orders:

(A) Gallup's petition for rehear .g is hereby denied.

(B) The Secretary shall cause prompt publication to be made in the Federal Register.

By the Commission.

(SEAL)

Lois D. Cashell,
Acting Secretary.

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[11] Docket No. E-9454, Order issued July 31, 1975, (mimeo at 4); Docket No. E-9454, Order issued September 26, 1975, (mimeo at 8).

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; William L. Springer and Don S. Smith.

Public Service Company of New Mexico)
Docket No. E-9454

ORDER DENYING MOTION TO REJECT, INSTITUTING SECTION 206(a) PROCEEDING, GRANTING INTERVENTIONS, AND ESTABLISHING DATES

(Issued July 31, 1975)

On May 21, 1975, Public Service Company of New Mexico (PNM) tendered for filing a proposed rate schedule supplement[1] that would increase revenues from its sole jurisdictional municipal customer, the City of Gallup, New Mexico (Gallup), by $847,549 based upon Period I, calendar year 1974.

The proposed rate increases the demand charge to $5.15/kw and the energy charge to 6.2 mills/kWh. It adds a system charge of $500 per delivery point. The power factor is increased to 90% and the customer will pay $0.25 for each RKVA in excess of the allowed 0.48 RKVA per kw of billing demand. The new ratchet clause is pegged to the highest of the following: 75% of the highest kw demand established during the preceding eleven months, the contracted minimum kw demand, or the minimum demand of 10,000 kw specified in the

[1] Designated as: Public Service Company of New Mexico, Supplement No. 4 to Rate Schedule FPC No. 2, (Supersedes Supplement No. 3).

proposed rate. The fuel adjustment clause has been revised and is in conformance with Commission Order No. 517.

PNM states that the reason for the proposed change in rate is that, at the present time, the rate of return to PNM for its service to Gallup is negative and that it is necessary to bring the rate of return in line with present day conditions. PNM's Statement N indicates that the proposed rate increase would have resulted in an earned rate of return of 9.892% in calendar year 1974.

PNM proposes that the new rate become effective on July 31, 1975. Notice of the filing was issued on June 4, 1975, with comments, protests, or petitions to intervene due on or before June 16, 1975. On June 9, 1975, Gallup requested an extension of time for the closing date for petitions to intervene. On June 13, 1975, the Secretary issued a notice extending the time for filing petitions to intervene to and including June 30, 1975. On June 16, 1975, the New Mexico Public Service Commission filed a Notice of Intervention.

On June 30, 1975, Gallup filed a Motion to Reject, Protest, and Petition to Intervene. Gallup asserts, *inter alia*, that the existing contract between PNM and Gallup is a fixed-rate contract that does not permit unilateral Section 205 rate increase filings and therefore PNM's proposed rate increase must be rejected under the *Sierra-Mobile* doctrine.[2] Gallup further asserts that PNM's filing must be rejected for failure to comply with Sections 35.13(b)(4)(iii) and Section 35.13(b)(2) of the Commission's Regulations. Gallup alleges that the proposed rate

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[2] *Federal Power Commission v. Sierra Pacific Power Company*, 350 U.S. 348 (1956); *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S. 322 (1956).

is discriminatory vis-a-vis PNM's wholesale customer Community Public Service Company (CPS); and Gallup argues that the proposed rate will foreclose it from competing with PNM for retail loads through a price squeeze situation, thereby necessitating rejection of the filing.

On July 15, 1975, PNM filed an Answer to Gallup's motion which opposed, *inter alia*, Gallup's argument for rejection of the filing and Gallup's discrimination and price squeeze allegations.

PNM cites the following language from the present PNM-Gallup contract (FPC Rate Schedule No. 2), as amended by Amendment No. One, under "Change in Rate".:

> "Not withstanding the earliest effective date of termination (July 1, 1977) as set forth in Article II (Term) above, should the rates charged herein to the consumer by the Company be increased for any reason whatsoever other than fuel cost or tax adjustments provided for herein, then and in that event, the Consumer shall immediately have the option within (90) days after the consumer is given notice of such rate increase to terminate this agreement; provided, however, that the Company will supply for a two (2) year period thereafter such power and energy in accordance with the new or increased rates as may be requested by consumer from time to time up to the amount specified in Article IV hereof."

PNM asserts that this language evidences the clear right of PNM to file a unilateral rate increase. We do not think that this language goes to the *Mobile-Sierra* issue of whether the contract permits the selling public utility to unilaterally file for an increase in rates, but rather provides an option to the customer if the rates charged to it are increased for any reason.

Both parties quote from Article XII, as amended by Amendment No. One, of the PNM-Gallup contract:

> "This contract, including the tariff made a part hereof, shall at all times be subject to such changes or modifications as shall be *ordered* from time to time by *any legally constituted regulatory body having jurisdiction* to require such changes or modifications." (emphasis supplied)

Gallup argues that this provision bars unilateral rate increase filings; while PNM argues that it permits them.

We believe that this is the important language to focus on with respect to the *Mobile-Sierra* issue. The U.S. Court of Appeals has stated, "the rule of *Mobile-Sierra* and *Memphis*[3] is refreshingly simple. The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid."[4] We think that the key language in the clause at issue is that the rate shall be subject to change by order issued by the regulatory body having jurisdiction, which is this Commission. In the *Mobile* case, the Court stated in reference to Section 4(d) of the Natural Gas Act, which is equivalent to Section 205(d) of the Federal Power Act:

> "Section 4(d) provides not for the filing of 'proposals' but for notice to the Commission of any 'change . . . made by' a natural gas company, *and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action.*" *Mobile supra*, at 342 (emphasis supplied)

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[3] *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958).

[4] *Richmond Power and Light Co. v. F.P.C.*, 481 F.2d 490, 493 (USCA-DC Cir. 1974).

Since the parties provided for a change in rate only by order issued by the Commission, it is clear they did not contemplate the unilateral filings permitted by Section 205. Accordingly, we shall institute a Section 206(a) proceeding and set the just and reasonable rate for PNM's service to Gallup pursuant to Section 206(a),[5] any change to be prospective in application.

Gallup asserts that PNM's filing must be rejected for failure to comply with Section 35.13(b)(4)(iii) of the Regulations PNM tendered for filing its rate increase on May 21, 1975. It used calendar year 1974 data for Period I, and it did not submit Period II data, stating that the proposed increase was less than one million dollars and therefore Period II data was not required pursuant to Order No. 487. Gallup asserts that Period I should be May, 1974, through April of 1975. Gallup cites *Minnesota Power & Light Company*, Docket No. E-8494, Order of February 15, 1974, and *Public Service Company of New Hampshire*, Docket No. E-9290, Order of June 4, 1975. In *Minnesota, supra,* the Secretary sent out a deficiency letter on December 6, 1973, which stated, *inter alia*, that Minnesota's use of 1972 calendar year for Period I where Period II was calendar 1974 was not permissable under the Regulations. In *Public Service Company of New Hampshire, supra,* the Commission rejected proposed tariff sheets based upon a Period I of calendar year 1973 that were tendered for filing in February, 1975 and retendered in March, 1975. We think these precedents are distinguishable and that use of calendar year 1974 as Period I for PNM's May 21, 1975

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[5]We note that the procedures under such a Section 206(a) proceeding would not entail meeting the heavy burden of proof associated with the *Mobile-Sierra* decisions.

filing with a July 31, 1975, proposed effective date does not warrant rejection under the Regulations with respect to this case.

Gallup asserts that the filing must be rejected for failure to comply with Section 35.13(b)(2) of the Regulations in that PNM did not submit a "comparison of the proposed rate with other rates of the filing public utility for similar wholesale for resale and transmission services". The submission of this data is only required when similar services exist, and we think that the failure to file such data in this case does not warrant rejection of PNM's filing.

Gallup asserts that the proposed rate is discriminatory vis-a-vis PNM's wholesale customer CPS. Gallup may present evidence to substantiate this claim in the proceeding to be established.[6]

Gallup charges that the proposed rate will foreclose it from competing with PNM for retail loads through a price squeeze situation. The Commission must utilize a cost plus fair return standard for establishing the justness and reasonableness of the wholesale rate and does not have the authority under the Federal Power Act to set the wholesale rate predicated upon retail rates over which we have no jurisdiction.[7] We shall therefore limit this proceeding so as to exclude consideration of the price

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[6] *St. Michaels Utilities Commission v. The Eastern Shore Public Service Company of Maryland*, 35 FPC 591 (1966), affm'd 377 F.2d 912 (USCA - 4th Cir. 1967).

[7] See *e.g.*, *Virginia Electric and Power Company*, Docket No. E-9147, order issued January 22, 1975, *Carolina Power and Light Company*, Docket No. E-8884, order issued August 26, 1974; *Wisconsin Public Service Corporation*, Docket No. E-8867, order issued August 23, 1974, and *Pacific Gas and Electric Company*, Docket No. E-7777, order issued March 14, 1974.

squeeze issue. We are aware of Gallup's reliance upon *Conway Corporation v. F.P.C.*, 510 F.2d 1264 (1975). However, the Court in Conway stayed its mandate pending appeal by the Commission. Accordingly, Gallup may renew its request for consideration of the price squeeze issue when and if the *Conway* decision becomes final.[8]

The Commission finds:

(1) The motion to reject PNM's rate increase filing for service to Gallup should be denied.

(2) A proceeding under Section 206(a) of the Federal Power Act should be instituted to determine the just and reasonable rate to be charged Gallup. Such proceeding should use the material in PNM's original filing of May 21, 1975.

(3) Gallup may introduce evidence as hereinafter ordered to substantiate its claim that the proposed rate is discriminatory vis-a-vis PNM's wholesale customer CPS.

(4) "Price-squeeze" issues should be excluded from these proceedings.

(5) Good cause exists to permit the intervention of Gallup and the New Mexico Public Service Commission as hereinafter limited.

The Commission orders:

(A) Gallup's motion to reject is denied.

(B) We hereby institute a proceeding under Section 206(a) of the Federal Power Act to determine the just

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[8]On July 23, 1975, Gallup filed a Reply to PNM's Answer; and on July 24, 1975, PNM filed a Motion to Reject Or In The Alternative For Leave To File A Response Thereto. Our review of these pleadings indicate that no new issues of fact or law are raised. We deny the motion to reject and the request for leave to file a response.

and reasonable rate to be charged Gallup. Materials contained in the original PNM filing of May 21, 1975, shall form the basis of the proceeding.

(C) Pursuant to the authority of the Federal Power Act, particularly Section 206 thereof, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act (18 CFR Chapter I), a public hearing shall be held on November 11, 1975, at 10:00 A.M., in a hearing room of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426.

(D) On or before September 30, 1975, the Commission Staff shall serve its prepared testimony and exhibits. Prepared testimony and exhibits of intervenors, if any, shall be served on or before October 14, 1975. Company rebuttal shall be served on or before October 28, 1975.

(E) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for that purpose (See Delegation of Authority, 18 CFR 3.5(d)), shall preside at the hearing in this proceeding, shall prescribe relevant procedural matters not herein provided, and shall control this proceeding in accordance with the policies expressed in the Commission's Rules of Practice and Procedure.

(F) Any rate increase to Gallup which we may approve shall be effective from the date of such approval.

(G) PNM may not bill Gallup at the rate proposed herein or at such other rate as the Commission shall find just and reasonable until completion of the proceeding herein ordered and approval of the new rate.

(H) Gallup and the New Mexico Public Service Commission are hereby permitted to intervene in these proceedings, subject to the Rules and Regulations of the

Commission; *Provided, however,* that the participation of Gallup shall be limited to matters affecting rights and interests specifically set forth in its petition to intervene, with the exclusion of price squeeze issues; and *Provided, further,* that the admission of such intervenors shall not be considered as recognition by the Commission that it might be aggrieved because of any order or orders issued by the Commission in this proceeding.

(I) Gallup may introduce evidence according to the aforesaid procedural dates to substantiate its claim that the proposed rate is discriminatory vis-a-vis PNM's wholesale customer CPS.

(J) Nothing contained herein shall be construed as limiting the rights of parties to this proceeding regarding the convening of conferences or offers of settlement pursuant to Section 1.18 of the Commission's Rules of Practice and Procedure.

(K) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; William L. Springer, and Don S. Smith.

Public Service Company of New Mexico) Docket No. E-9454

ORDER DENYING APPLICATION FOR REHEARING AND PETITION FOR REHEARING

(Issued September 26, 1975)

On May 21, 1975, Public Service Company of New Mexico (PNM) tendered for filing a proposed rate schedule supplement[1] that would increase revenues from its sole jurisdictional municipal customer, the City of Gallup, New Mexico (Gallup), by $847,549 based upon Period I, calendar year 1974.

Notice of the filing was issued on June 4, 1975. On June 13, 1975, the Secretary issued a notice extending the time for filing petitions to intervene to and including June 30, 1975. On June 30, 1975, Gallup filed a Motion to Reject, Protest, and Petition to Intervene. Gallup asserted that the existing contract between PNM and Gallup is a fixed-rate contract that does not permit unilateral Section 205 rate increase filings and that therefore the Commission must reject PNM's proposed rate increase under the *Mobile-Sierra* doctrine.[2] Gallup

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[1] Designated as: Public Service Company of New Mexico Supplement No. 4 to Rate Schedule FPC No. 2 (Supersedes Supplement No. 3).

[2] *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S. 322 (1956); *Federal Power Commission v. Sierra Pacific Power Company*, 350 U.S. 348 (1956).

further asserted, *inter alia*, that PNM's filing must be rejected for failure to comply with Sections 35.13(b)(4)(iii) and Section 35.13(b)(2) of the Commission's Regulations.

By order issued July 31, 1975, the Commission, *inter alia*, denied Gallup's motion to reject PNM's rate increase filing on *Mobile-Sierra* grounds and on Gallup's contentions that PNM failed to comply with the filing requirements of Sections 35.13(b)(4)(iii) and Section 35.13(b)(2). However, the Commission found that the existing PNM-Gallup contract did not permit the filing of Section 205 unilateral rate increase filings, but that the contract permitted a change in rate pursuant to a Section 206(a) proceeding without the heavy burden of proof associated with the *Mobile-Sierra* decisions. The Commission permitted PNM to use its filing materials as the basis for the Section 206(a) proceeding, but the Commission prohibited PNM from billing Gallup at the proposed rate or at any other rate that the Commission shall find just and reasonable until completion of the Section 206(a) proceeding and order of the Commission approving the new rate.

On August 29, 1975, PNM and Gallup applied for rehearing of the Commission's July 31, 1975, order.

As we pointed out in our July 31, 1975, order, at mimeo p. 3, 4, the U.S. Court of Appeals has stated that: "the rule of *Sierra, Mobile* and *Memphis*[3] is refresingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid."[4] The Court further

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[3] *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958).

[4] *Richmond Power and Light Company v. F.P.C.*, 481 F.2d 490, 493 (USCA - DC Cir. 1973).

explained that the principles of *Mobile-Sierra* applied "whether the parties agree to a specific rate or whether to a rate changeable in a specific manner. In either case, the contract is binding and a unilateral filing is ineffective to change it."[5] The Commission must look initially to the contract to determine what the parties intended. There is some deference that should be accorded the Commission's interpretation of the parties' intent as revealed in the language of the contract.[6]

PNM argues that the Commission erroneously concluded that the "special option to terminate" granted Gallup in Article II of the PNM-Gallup contract did not evidence an intent on behalf of the parties to permit unilateral rate increases.

The following is the provision in Article II, as amended by Amendment No. One, under "*Change in Rate*", of the PNM-Gallup contract, which we quoted in the July 31, 1975, order at mimeo p. 3, and which PNM refers to as the "special option to terminate":

> "Not withstanding the earliest effective date of termination (July 1, 1977) as set forth in Article II (Term) above, should the rates charged herein to the consumer by the Company be increased for any reason whatsoever other than fuel cost or tax adjustments provided for herein, then and in that event, the Consumer shall immediately have the option within (90) days after the consumer is given notice of such rate increased to terminate this agreement; provided, however, that the Company will supply

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[5] *Id.*, at p. 497.

[6] *Gulf States Utilities Company v. F.P.C.*, No. 74-1160, ____ F.2d ____ (USCA-DC Cir., decided August 22, 1975) at mimeo p. 1652.

for a two (2) year period thereafter such power and energy in accordance with the new or increased rates as may be requested by consumer from time to time up to the amount specified in Article IV hereof."

As we stated in the July 31, 1975, order, the Commission does not think that this language goes to the *Mobile-Sierra* issue of whether the contract permits the selling public utility to unilaterally file for an increase in rates, but rather provides an option to the customer if the rates charged to it are increased for any reason.

The crux of PNM's criticism of the Commission's interpretation is that PNM can not think of any way the rate can be increased under this contract so that the customer could exercise his special option to terminate, for this clause excludes the automatic fuel and tax adjustments. However, there is a way the rate can be increased. The Commission could order an increase in the rate after a Section 206(a) proceeding, and this clause would allow the customer to exit from the contract if he so chose. Article XII, as amended by Amendment No. One, the first paragraph of which we quoted in the July 31, 1975, order at mimeo p. 3, reads as follows:

"This contract, including the tariff made a part hereof, shall at all times be subject to such changes or modifications as shall be *ordered* from time to time by any *legally constituted regulatory body having jurisdiction to require such changes or modifications.*

It shall be expressly understood that nothing contained in this contract shall be construed to confer upon said Commission power or jurisdiction to regulate or supervise rates or services of the Consumer to its electrical users, *nor does this Article XII change or affect the rights of the Consumer to terminate this Agreement as provided under Article*

> *II hereof,* and no inspection or supervision fee shall be paid the Commission by the Consumer." (emphasis added)

In making this interpretation, we relied on the language in Article XII and the language of the U.S. Supreme Court in the *Mobile* case, that we quoted on our July 31, 1975, order at mimeo p. 4, and that we herein quote again.

> "Section 4(d) provides not for the filing of 'proposals' but for notice to the Commission of any 'change . . . made by' a natural gas company, *and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action." Mobile, supra,* at 342 (emphasis supplied)

Section 4(d) of the Natural Gas Act is the equivalent to Section 205(d) of the Federal Power Act.

PNM argues that the Commission erroneously concluded that Article XII of the PNM-Gallup contract intends a rate change only by order of the Commission issued at the conclusion of a Section 206(a) proceeding. PNM argues that Article XII is a verbatim copy of a provision prescribed by the New Mexico Public Service Commission for inclusion in intrastate tariffs and that the FPC should look to New Mexico procedures to interpret it. First, we would point out that this language in the first paragraph of Article XII was included by Amendment No. One dated February 20, 1968. This language replaced the following language in the 1962 contract:

> "This Agreement shall at all times be subject to such changes or modifications by the New Mexico Public Service Commission of the State of New Mexico, or its successors having jurisdiction, as said Commission may from time to time direct in the exercise of its jurisdiction."

The new language evidences an awareness by the parties of federal jurisdiction over the contract. Secondly, the language, on its face, in Article XII, does not direct us to New Mexico procedures. This distinguishes the procedures followed in *Richmond Power and Light v. F.P.C., supra.*[7]

PNM directs us to language in an order terminating proceeding in *Central Telephone & Utilities Corporation, Western Power Division,* Docket No. E-7602, issued October 18, 1973, where the Commission stated that rate changes under Section 205 are effected by order of the Commission. This language is contrary to the language of the U.S. Supreme Court in the *Mobile* case quoted *supra.* Moreover, the language in the *Central Telephone* case was in the nature of *dicta* and had no bearing on our disposition of the case. In *Central Telephone*, there were two classes of customers, the cooperatives and the municipals, each with a different contractual provision related to the *Mobile-Sierra* issue. By motion filed December 15, 1971, Central Telephone moved that if the Commission was unable to accept the filing for both classes of customers under Section 205, that the entire proceeding be conducted under Section 206. By order issued January 7, 1972, we granted this motion to treat both classes of customers under Section 206; for, *inter alia*, we believed that the contracts with the cooperatives were clearly fixed-rate within the meaning of the *Mobile-Sierra* doctrine. Central Telephone, the cooperatives, and the municipals reached an agreement enabling Central Telephone to file a Section 205 rate increase, which it did on

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[7]Cf. *Gulf States Utilities Company v. F.P.C.*, No. 74-1160, ____ F.2d ____ (USCA - DC Cir., decided August 22, 1975), mimeo p. 1649, fn. 10.

July 26, 1973. By an order issued September 26, 1973, we permitted the rate increase to be made effective September 26, 1973. Since any relief under Section 206 is prospective only, we terminated the proceedings in Docket No. E-7602 in our order of October 18, 1973, on grounds of mootness. Therefore, our language in *Central Telephone* to the effect that contractual language allowed the municipals to file Section 205 rate increases was in the nature of *dicta* and had no bearing on our disposition of Docket No. E-7602.

We would point out that our order in *Central Telephone & Utilities Corporation* was issued on October 18, 1973. Since that date, we have taken the position that we are taking in this case in interpreting similar contractual language in the following cases and orders: *Indiana & Michigan Electric Company,* Docket No. E-7740, Order on Reconsideration, issued June 3, 1974; *Potomac Edison Company,* Docket No. E-8878, order issued July 31, 1974; *Southern California Edison Company,* Docket No. E-8176, orders issued January 23, 1975, and March 21, 1975; *Detroit Edison Company,* Docket No. E-9294, order issued July 2, 1975.

PNM argues that Article XII of the PNM-Gallup contract preserves the special option to terminate in Article II, which PNM maintains evidences an intent by the parties to permit Section 205 rate increase filings. We agree that Article XII preserves the special option to terminate in Article II, but we do not agree with PNM's interpretation of the special option to terminate, for we believe it is meant to permit the customer to exit from the contract if the rate is increased after a Section 206(a) proceeding.

Three other points raised by PNM will now be addressed. We believe that the "*Term*" provision in Article

II provides an escape for the customer when there is no increase in rate, while the "*Chance in Rate*" provision provides an escape for the customer when there is an increase in rate. Because PNM gave Gallup the special option to terminate, it does not follow that it was rewarded with the right to file unilateral rate increases in the same clause, rather it was rewarded with the right to have the rate increased pursuant to a Section 206(a) proceeding in Article XII. We believe the "notice" mentioned in the special option to terminate does not refer to the notice in Section 205 of the Federal Power Act, but rather is used in the ordinary meaning of notice under contract law.

PNM cites two orders of the Commission in *Arkansas-Missouri Power Company*, Docket No. E-9092, issued November 29, 1974, and January 29, 1975, as being inconsistent with the Commission's interpretation of the special option to terminate as contemplating a change in rate by Section 206(a) and not also by Section 205. However, we believe that the language in Articles II and XII, both as amended, clearly indicates that the parties intended any change in rate only to be effected by a Section 206(a) proceeding, while the contractual language in *Arkansas-Missouri* quoted at mimeo p. 3 of PNM's application for rehearing[8] is much broader in scope and permits rate changes pursuant to Section 205 filings.

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[8]The contractual language PNM quotes reads as follows:

'In the event that the transmission charges be lawfully amended so as to increase transmission charges for power and energy delivered, then Cooperative may at its option cancel this Agreement under the same terms and conditions as provided in Paragraph 12 of Part I.'

In its petition for rehearing, Gallup argues that the Commission erred in holding in this Section 206(a) proceeding that PNM would not be required to meet the heavy burden of proof associated with the *Mobile-Sierra* decisions as indicated in footnote 5, mimeo p. 4, of the July 31, 1975, order. This footnote was not inadvertent and Gallup correctly read our order. By a combination of the language in the *Mobile* case quoted at mimeo p. 4 of the July 31, 1975, order and the language in the first paragraph of Article XII, as amended, quoted at mimeo p. 3 of the July 31, 1975, order, both of which are requoted herein, the Commission determined that it was the intent of the parties to allow change in the contract rate pursuant to a Section 206(a) proceeding and not pursuant to a Section 205 proceeding. We are not attempting an "end run" around the *Mobile-Sierra* doctrine, but are only trying to properly interpret the intent of the parties. Article XII reflects an awareness by the parties that their contract could be subject to the jurisdiction of the FPC and the contract is, in fact, subject to our jurisdiction. The parties are presumed to know the law governing their contract, and the *Mobile* case has been law since 1956.

Gallup states at mimeo p. 2 of its petition for rehearing that:

> "This interpretation flies in the face of action taken by the Supreme Court, courts of appeal and by the Commission in all other such cases in which the Commission has been held obligated to impose the heavier *Sierra-Mobile* evidentiary burden set down by the Supreme Court."

We disagree. The language that we quoted from the *Mobile* case speaks for itself. We have taken the position that we are taking in this case in the following cases and

orders: *Indiana & Michigan Electric Company*, Docket No. E-7740, Order on Reconsideration, issued June 3, 1974; *Potomac Edison Company*, Docket No. E-8878, order issued July 31, 1974; *Southern California Edison Company*, Docket No. E-8176, orders issued January 23, 1975, and March 21, 1975; *Detroit Edison Company*, Docket No. E-9294, order issued July 2, 1975.

Gallup's citation of *Carolina Power & Light Company*, 47 F.P.C. 1 (1972), and *Mississippi Power Company*, 50 FPC 885 (1973) misses the point. In this case, we are making the finding that the intention of the parties as expressed in their contract was to allow change pursuant to a Section 206(a) proceeding, while in those cases the parties did not allow for such change and thus must meet the test of *Mobile-Sierra* to effectuate a change in rate. Similarly, the language quoted at mimeo p. 5 of Gallup's petition for rehearing from *Richmond Power & Light Company, supra,* is not on point, for in this case the parties intended that change could be effectuated under the contract pursuant to a Section 206(a) proceeding.

Gallup argues that the Commission acted contrary to its own regulations and abused its discretion in failing to reject PNM's filing as deficient in accordance with the provisions of Sections 35.13(b)(4)(iii) and Section 35.13(b)(2).

With respect to Section 35.13(b)(4)(iii), we distinguished in our July 31, 1975, order, at mimeo p. 5, the two cases originally cited by Gallup as justifying rejection of PNM's filing under this provision of the regulations. We also determined that a May 21, 1975, filing based upon Period I data of calendar 1974, was not sufficiently stale to warrant rejection. The regulation itself states that "the cost of service should contain unadjusted system costs for the most recent twelve consecutive months for

which actual data are available (Period I)". A utility may process cost of service data on a calendar year basis as a result of a calendar year basis of bookkeeping. What actual data may be considered "available" is a subjective judgment and open to interpretation. Actual data may be available quite soon after the fact, but not in a form suitable for filing as a cost of service statement. There is always a time lag between the collection of data and its incorporation into a rate filing. We have proposed a rulemaking, Docket No. RM76-6, notice of which was issued on September 3, 1975, to formally establish what we believe to be a fair and reasonable standard with respect to the submission of test period data. We note that under the proposed regulation the subject filing would be only twenty-one days outside the prescribed four months period. Moreover, having reviewed PNM's filing we find that it provides sufficient data and in such form as to allow us to properly test the reasonableness of its proposal. Under these circumstances, we affirm our decision not to reject. In this regard, we rely also on the language in Section 1.14 of the Commission's Rules of Practice and Procedure that papers tendered for filing will be rejected only where they "patently fail to conform" to a regulation; on the language in Section 35.5 of the Regulations, that material submitted for filing will be rejected only if it "patently fails to substantially comply" with the requirements of Part 35; and on the language in *Municipal Light Boards of Reading and Wakefield, Massachusetts v. F.P.C.*, 450 F.2d 1341, 1348 (1971), *cert. den* 405 U.S. 985 (1971):

> "Moreover, the filing requirements of our Regulations "... are 'mere aids to the exercise of [this Commission's] independent discretion,' and in both language and purpose leave room for a doctrine of 'substantial' or 'reasonable' compliance. *American*

Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970)."[9]

Gallup is wrong in stating that we are creating an ad hoc exception to the regulations. We did not allow rejection under Section 35.13(b)(4)(iii) for a filing made approximately ten days later than this filing in *Missouri Utilities Company*, Docket No. E-9473, order issued August 15, 1975.

With respect to Section 35.13(b)(2), we refused to reject PNM's filing in our July 31, 1975, order at mimeo p. 5, for failing to include a "comparison of the proposed rate with other rates of the filing public utility for similar wholesale for resale and transmission services." In our July 31, 1975, order, we found that similar services do not exist within the meaning of Section 35.13(b)(2) so as to require filing of such data under that regulation. We note the testimony of C. D. Bedford, Vice-President of PNM, that Gallup quotes at mimeo p. 9 of its petition for rehearing:

> "The Company has four wholesale electric customers, the City of Gallup (our only municipal customer), the Energy Research and Development Administration (formerly the Atomic Energy Commission) at Los Alamos, New Mexico, the Division of Colorado River Resources of the State of Nevada (DCRR) and Community Public Service Company. Both the DCRR and Community contracts were new in 1974. Under the DCRR contract PNM supplies power on a non-firm basis. The other three contracts are for firm power. During early 1974, the Company also sold firm power to Mora-San Miguel Electric Cooperative."

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[9] *Indiana & Michigan Electric Company*, Docket No. E-9239, order issued July 18, 1975, mimeo p. 4.

Gallup confuses two issues with its citation to *Wisconsin-Michigan Power Co.*, 31 F.P.C. 1445, 1450-51 (1961). The issue concerned herein is what constituted "similar" for filing purposes. The issue that the citation goes to is what constitutes comparable services for wholesale discrimination purposes. We ruled in our July 31, 1975, order at mimeo p. 5, that Gallup could raise the issue of wholesale price discrimination vis-a-vis PNM's wholesale customer Community Public Service Company (CPA) according to the procedural dates established. Our ruling that the services are dissimilar for filing purposes under Section 35.13(b)(2) does not prejudice any ruling that we will make upon completion of the Section 206(a) proceeding as to the similarity of the services rendered by PNM to Gallup and CPS for wholesale rate discrimination purposes. In not rejecting PNM's filing under Section 35.13(b)(2), we rely on the authorities cited with regard to Section 35.13(b)(4)(iii).

The Commission finds:

Neither PNM or Gallup has raised new issues of law or fact that warrant us granting rehearing of our July 31, 1975, order.

The Commission orders:

(A) PNM's application for rehearing and Gallup's petition for rehearing are denied.

(B) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX H

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr., and George R. Hall.

Public Service Company of New Mexico) Docket No. E-9454

ORDER AFFIRMING INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE

(Issued July 5, 1978)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.[1]

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for

[1]The "Commission" when used in the context of an action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of this proceeding were specifically transferred to the FERC by Section 402(a)(1) or 402(a)(2) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR ___ provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

By order issued September 8, 1976, the FPC rejected a proposed settlement in this proceeding and directed that a hearing be held to consider (1) whether the differences in rates charges by Public Service Company of New Mexico (PNM) of its retail and wholesale customers placed the City of Gallup in a price squeeze situation and (2) whether the costs of coal to PNM charged by its 50 percent subsidiary, Western Coal Company, are appropriate costs. On October 20, 1977, the presiding Administrative Law Judge issued an Initial Decision finding that there was no price squeeze and that the coal costs were reasonable. On November 18, 1977, PNM submitted a revised rate schedule for service to the City of Gallup similar to the schedule previously submitted as part of its settlement proposal, but conforming fully to the Judge's findings.

On November 21, 1977, Gallup submitted a brief on exceptions to the Initial Decision. Responses in opposition to the exceptions were filed by PNM and the Commission Staff. The FERC, after giving due consideration to each exception, finds that the exceptions are without merit. The FERC further finds that the rates

submitted by PNM on November 18, 1977 are just and reasonable for the reasons stated in the Initial Decision.

Western Coal Company (Western), 50 percent of which is owned by PNM, supplies fuel to PNM under the terms of a contract between the two companies. Western is not subject to the jurisdiction of the FERC or any other regulatory body. Pursuant to the Commission's Regulations, 18 CFR §35.14(a)(7), PNM is required to file its contract with Western with the FERC.

The Commission orders:

(A) The Initial Decision of the Administrative Law Judge is affirmed.

(B) PNM shall file its contract with Western, relating to the purchase of coal from Western, with the FERC within 15 days of the date of this order.

(C) PNM's revised rate schedule, submitted on November 18, 1977, is approved effective the date of this order.

By the Commission:

(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX I

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Georgiana Sheldon, Acting Chairman; Matthew Holden, Jr., and George R. Hall.

Public Service Company of New Mexico	)	Docket No. E-9454

ORDER DENYING REHEARING

(Issued December 15, 1978)

By order issued July 5, 1978, the Commission affirmed the Initial Decision of the Administrative Law Judge which held that the Public Service Company of New Mexico (PNM) rate increase did not place the City of Gallup, New Mexico, in a price squeeze situation and that the costs of coal to PNM charged by Western Coal Company were reasonable. PNM and Gallup have applied for rehearing of the Commission's order. On September 5, 1978, the Commission granted rehearing to both parties for the limited purpose of further consideration of the issues raised in their applications.

PNM's application is limited to the Commission's determination that PNM is required to file its contract with Western pursuant to section 35.14(a)(7) of the Commission's Regulations. This regulation provides that when a utility purchases fuel from a company-owned or controlled source, the utility must file the purchase contract with the Commission for acceptance if the source is not under the jurisdiction of another regulatory body. PNM argues that (1) despite the fact that it owns 50 percent of Western, it does not have a controlling

interest in Western, and (2) the New Mexico Public Service Commission exercises regulatory control over Western.

PNM's arguments are not meritorious. "Control" is defined in section 101, definition 5B of the Commission's Regulations as the power to direct or cause the direction of the management and policy of a company, directly or indirectly through a majority or minority ownership (18 C.F.R. §101). Fifty percent ownership of Western gives PNM sufficient power to meet this test.

With respect to PNM's second argument, the New Mexico Public Utilities Act gives the New Mexico PSC the authority to regulate a "public utility',[1] but coal companies do not fall within the statutory definition of "public utility".[2] The only support PNM offers for its position is a recent New Mexico PSC decision involving PNM's proposed increased rates for electric service to two United States Air Force bases.[3] That case confers no regulatory authority over Western to the New Mexico PSC. That Commission did no more than this Commission did in this proceeding. It determined whether PNM's full coal costs were reasonable and could be reflected in the company's rates.

The issues which Gallup presents in its application were considered by the Commission when it affirmed the

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[1] New Mexico Statutes § 68-5-4 (1953).

[2] New Mexico Statutes § 68-3-2 (1953).

[3] In the matter of a New Rate Filing by Public Service Company of New Mexico for Electric Rates to the United States Government Installations to Apply to Air Force Plant 83 and Kirtland Air Force Base, Case No. 1233, Findings of Fact and Order, issued July 23, 1976.

Initial Decision. Gallup offers no facts, legal principles, or other reasons that would warrant any change in, or modification of, the Commission's order of July 5, 1978.

The Commission orders:

The PNM and Gallup applications for rehearing are denied.

By the Commission.

(SEAL)

Lois D. Cashell,
Acting Secretary.

APPENDIX J

SECTIONS 205, 206 AND 313 OF THE FEDERAL POWER ACT

Sec. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days'

notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order

require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f)(1) Not later than 2 years after the date of the enactment of this subsection and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause, if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

Sec. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferen-

tial, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

Sec. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside the order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its

findings as to the facts by reason of additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

APPENDIX K

§35.14 Fuel Cost adjustment clauses.

(a) Fuel adjustment clauses which are not in conformity with the principles set out below are not in the public interest. These regulations contemplate that the filing of proposed rate schedules which embody fuel clauses failing to conform to the following principles may result in suspension of those parts of such rate schedules:

(7) Where the cost of fuel includes from company-owned or controlled[1] sources, that fact shall be noted and described as part of any filing. Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the adjustment clause. If the current price, however, is in litigation and is being collected subject to refund, the utility shall so advise the Commission and shall keep a separate account of such amounts paid which are subject to refund, and shall advise the Commission of the final disposition of such matter by the regulatory body having jurisdiction. With respect to the price of fuel purchases from company-owned or controlled sources pursuant to contracts which are not company-owned or controlled sources pursuant to contracts which are not subject to regulatory authority, the utility company shall file such contracts and amendments thereto with the Commission for its acceptance at the time it files its fuel clause or modification thereof. Any subsequent amendment to such contracts shall likewise be filed with the Commission as a rate

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[1] As defined in the Commission's Uniform System of Accounts 18 CFR Part 101, Definitions 5B.

schedule change and may be subject to suspension under section 205 of the Federal Power Act Fuel charges by affiliated companies which do not appear to be reasonable may result in the suspension of the fuel adjustment clause or cause an investigation thereof to be made by the Commission on its own motion under section 206 of the Federal Power Act.

B. "Control" (including the terms "controlling," "controlled by," and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement, and whether such power is established through a majority or minority ownership or voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts, associated companies, contract or any other direct or indirect means.

APPENDIX L

CONTRACT FOR ELECTRIC SERVICE

Between

THE CITY OF GALLUP

and

PUBLIC SERVICE COMPANY OF NEW MEXICO

THIS AGREEMENT made this 30th day of October, 1962 by and between the PUBLIC SERVICE COMPANY OF NEW MEXICO (hereinafter called the "Company") a New Mexico corporation with principal office and place of business in Albuquerque, New Mexico, its successors and assigns, and the CITY OF GALLUP, NEW MEXICO, a municapal corporation of Mc Kinley County in the State of New Mexico, (hereinafter called "the Consumer"), WITNESSETH

WHEREAS, the parties hereto have entered into that certain agreement for electric service dated November 10, 1959, wherein the Company agreed to sell and the Consumer agreed to receive the electric power requirements of Consumer not supplied by Consumer's own generating plant; and

WHEREAS, under and pursuant to the provisions of said agreement of November 10, 1959, the Company, in order to effect performance thereunder, constructed a 115 KV transmission line extending from Ambrosia Lake to the point of delivery required by Consumer, at or near the Gallup Power Plant, and constructed necessary substation facilities at the Gallup Power Plant; and

WHEREAS, at all times subsequent to on or about July 1, 1960, the date of completion of said transmission line and said facilities so agreed to be constructed and

furnished by Company, said Company and Consumer have performed under the agreement of November 10, 1959, all in accordance with the provisions thereof; and

WHEREAS, the parties hereto desire to amend the terms and conditions of said agreement in accordance with the provisions hereinafter set forth;

NOW THEREFORE, in consideration of the mutual covenants herein set forth, the parties hereto agree as follows:

ARTICLE I

Cancellation of Existing Contract:

The contract between Consumer and Company dated November 10, 1959 for delivery power to Consumer is hereby cancelled as of the effective date of this contract as hereinafter defined.

ARTICLE II

Term:

This contract shall become effective as of 11-1-62, subject to its execution by the parties and to the City of Gallup enacting a valid Ordinance (in compliance with Section 14-39-1 of the New Mexico Statutes, 1953 Annotation) providing and establishing the terms of this Contract by such Ordinance and such Ordinance taking effect.

The term of this contract shall be twenty-five (25) years from and after the date of execution of the within agreement; provided, however, that the Consumer shall have the right by giving at least 24 months' advance written notice of termination to the Company and paying to the Company the sum of One Hundred Dollars ($100) by good and sufficient check of the Consumer to termi-

nate this contract at any time. It is understood and agreed that such notice of termination and payment may be given by Consumer at any time after execution of this contract, but in no event shall the effective date of termination be earlier than December 31, 1967, or earlier than 24 months from the date of notice and payment as provided above, whichever shall be later. Such notice and payment shall be given by Consumer by mailing said notice and payment to the Company by certified mail addressed to the Company at its offices in Albuquerque, New Mexico. Such notice shall have incorporated therein a true copy of the resolution duly adopted at a regular meeting of the City Council authorizing such notice and payment, and the notice shall be executed by the Mayor and sealed and attested by the City Clerk.

Change in Rate:

Not withstanding the earliest effective date of termination (December 31, 1967) as set forth in Article II (Term) above, should the rates charged herein to the Consumer by the Company be increased for any reason whatsoever other than fuel cost or tax adjustments provided for herein, then and in that event, the Consumer shall immediately have the option within ninety (90) days after the Consumer is given notice of such rate increase to terminate this agreement; provided, however, that the Company will supply for a two (2) year period thereafter such power and energy in accordance with the new or increased rates as may be requested by Consumer from time to time up to the amount specified in Article IV hereof. The Consumer may exercise this option by giving the Company written notice of such termination and paying the Company the sum of One Hundred Dollars ($100) by good and sufficient check of the Consumer. Such notice and payment shall be given by the

Consumer by mailing such notice and payment to the Company by certified mail addressed to the Company at its offices in Albuquerque, New Mexico.

Such notice shall have incorporated therein a true copy of the resolution duly adopted at a regular meeting of the City Council authorizing such notice and payment, and the notice shall be executed by the Mayor and sealed and attested by the City Clerk.

ARTICLE III

Service Characteristics; Lands and Easements:

The electric power and energy to be furnished shall be three (3) phase alternating current at a nominal voltage of thirteen thousand eight hundred (13,800) volts, and a nominal frequency of sixty (60) cycles per second, and shall be delivered to the Consumer at the point at which the Consumer's 13,800 volt circuit or circuits are attached to the 13,800 volt circuit of the Company. The Consumer hereby agrees, over and upon land which is owned or controlled by Consumer, to furnish free of cost all rights-of-way and easements for Company's transmission lines and facilities incidental thereto which may hereafter be required to serve the Consumer, and to furnish the Company and its employees access to the Consumer's premises free of toll or other charges when the employees are on Company business. Said rights-of-way and easements shall be extinguished at the termination of this agreement by expiration of time or otherwise. To the extent of the Consumer's authority under its present or any future lease with the Gallup-Gamerco Coal Company, the Company is hereby given permission by the Consumer during the continuation of any such agreement to use and occupy a tract of ground measuring approximately 200' x 200', for use as a site for a

transformer substation and necessary facilities used to serve Consumer.

ARTICLE IV

Generation by Consumer and Contract Power:

It is recognized and agreed by the parties hereto that the Consumer, as of the effective date of this contract, has installed and will retain in an operating condition during the term of this Agreement, electric generating facilities in its Gallup Power Plant, which for purposes hereof shall be considered to have a net generating capability of 16,100 kilowatts. The Consumer shall have the right to generate its own power requirements in the manner and to the extent deemed by it to be necessary and desirable. The Company agrees to furnish and the Consumer agrees to receive, take, and pay for the Consumer's electric power and energy requirements which are not supplied by the Consumer' own generating plant in amounts which Consumer may from time to time require up to a maximum rate of delivery (hereinafter called the "contract rate of delivery"), from the Company of 20,000 kilowatts, except as provided in Article XI.

The Consumer agrees to maintain its generating plant in such a condition as to be operable during interruptions in service due to scheduled maintenance or emergencies on the Company's generating plant or the Company's substation and transmission line facilities used principally for providing service to the Consumer, such operation of the Consumer's generating plant to be required only when the Company has no other way of supplying the requirements of the Consumer. In this regard the Company will utilize all reasonable means to make necessary repairs or replacements to damaged facilities, to enable restoration of service to the Consumer as quickly as possible.

The Consumer further agrees to sell to the Company upon its request electric power and energy which is available during times of emergency interruption in service from the Company, and which in the sole judgment of the Consumer may be surplus to the Consumer's requirements. The Company agrees to pay the Consumer for such emergency service at the rate of one cent ($0.01) per kilowatthour for all such electric service received by the Company for its own use at the point of delivery specified herein. The rate to be paid by the Company to the Consumer under the provisions of this Article IV is based upon a weighted average cost of fuel consumed during each period of purchase by the Company of not more than 31 cents per million BTU or less than 29 cents per million BTU. Whenever the weighted average fuel cost is above 31 cents per million BTU, or below 29 cents per million BTU, the KWH billed to Company under this Article shall be increased or decreased 0.0075 (seventy-five ten thousandths) cents per KWH for each 0.5 (five-tenths) cents variation or major fraction thereof in said average fuel cost above 31 cents or below 29 cents per million BTU.

ARTICLE V

Rates:

All power and energy supplied Consumer by Company hereunder shall be paid for by Consumer at the following monthly rate:

A monthly demand charge of:

$0.725 per KW of monthly billing demand determined as hereinafter provided.

Plus a monthly energy charge of:

4.25 mills ($0.00425) per KWH for all electric energy delivered to Consumer by Company during the month.

Monthly Minimum Charge: The monthly minimum charge for electric service furnished hereunder shall be the charges specified herein but in no case less than $10,000 per month. The Consumer shall be granted a credit against said minimum charge of $25 per hour for each one hour, or major fraction thereof, that the Consumer does not receive electric service from the Company as provided for herein.

Determination of KW Billing Demand: The monthly KW billing demand for power received by Consumer from the Company shall be determined by measurement and shall be the highest 15-minute integrated or thermal KW demand as measured by standard metering equipment or by calculations based upon measurements made by other types of standard metering equipment. The billing demand for any month shall be as thus determined, but in no event shall it be less than 50 per cent of the highest KW billing demand established during the preceding eleven months, or 5,000 KW, whichever is greater.

Fuel Cost Adjustment: The above rates are based upon a weighted average cost of all fuel consumed at all the steam electric generating stations of the Company during the month immediately preceding the billing period of this contract of not more than 21 cents per million BTU or less than 19 cents per million BTU.

Whenever said monthly weighted average fuel cost is above 21 cents per million BTU, or below 19 cents per million BTU, the KWH billed under the schedule shall be increased or decreased 0.0075 (seventy-five ten thousandths) cents per KWH for each 0.5 (five-tenths) cents variation or major fraction thereof in said average fuel cost above 21.0 cents or below 19.0 cents per million BTU.

Reactive Power:

Each party to this Agreement shall operate and maintain its system in the most efficient manner practicable, and both Company and Consumer will exercise due diligence in the operation of its system so as to maintain a power factor which according to good engineering practices is considered proper and reasonable. Consumer further agrees, insofar as possible, to maintain a power factor on purchases from the Company of not less than 80 per cent lagging.

Taxes:

The rates under this contract are based upon and are dependent upon Federal State, County, Municipal, and other government levies, gross receipts, license fees, franchise taxes, and other impositions of similar character in effect as of the effective date of this contract.

In case of increase in rates of existing taxes of this character or additional new taxes, licenses or fees based upon generation, distribution, purchase and/or sale of electric power, current or energy shall be imposed upon or required to be paid by the Company, the rates herein may be increased by surcharge added equal to the amount of the cost per KWH or per customer, or per unit of demand or gross receipts or other applicable or allocable unit of charge for such new or additional taxes, licenses or fees; however this tax adjustment shall only be applied when authorized by order of the New Mexico Public Service Commission.

Use of Service:

The Consumer shall only sell power and energy purchased under this Agreement to customers covered by Article XI hereof, or within 1,000 feet on either side of the Consumer's existing transmission lines or 1,000 feet

on either side of a transmission line constructed primarily for serving a Consumer owned or operated facility.

ARTICLE VI

Metering:

All electric energy delivered to the Consumer shall be measured at thirteen thousand eight hundred (13,800) volts at the delivery point defined in Article III hereof by meter or meters to be furnished by the Company pursuant to the first provision of Article X.

In case of question as to the accuracy of the Company's measuring instruments, either party shall have the right at any time, and from time to time, upon giving forty-eight (48) hours' notice to the other party, to have them tested, and, if necessary, recalibrated, with both parties represented at the test.

If it shall be shown by the test that any of the measuring instruments are inaccurate, proper allowance as shown by the test to be necessary shall be made to the party entitled thereto, but not for a longer period than thirty (30) days prior to the time when written complaint of inaccuracy is made. No allowance will be made on any bill on account of claim for inaccuracy of measurement unless Consumer shall in writing request such allowance within thirty (30) days from date of bill. If the Company's measuring instruments fail to register at any time during any month, the power delivered during such month shall be estimated upon the basis of the amount of power delivered during the last preceding or next succeeding period of one month that the Consumer's electric system is operated under conditions similar to those existing during the month in which said instruments failed to register.

The expsnse of the test and/or recalibration shall be borne by the Consumer if the Company's meters are found to be accurate within 2 per cent (2%); otherwise, the cost of the test shall be paid by the Company. No allowance in the charge for power shall be made the Consumer unless the error of the meter or meters exceeds 2 per cent (2%).

ARTICLE VII

Payments:

As soon as practicable after the end of each month, (the term "month" to be taken to mean the period between any two consecutive regular readings at approximately thirty (30) day intervals by the Company of the meters) the Company shall render a bill to the Consumer for all charges hereunder for such month, and the Consumer shall pay such bill to the Company within ten (10) days from date.

ARTICLE VIII

Default:

If the Consumer shall make default in the performance of any of its obligations under this agreement, after 30 days' written notice by certified mail to the Mayor and City Clerk specifying the default, the Company may suspend service during the default, such suspension not to interfere with the enforcement by the Company of any rights under this Agreement or of any other legal right or remedy. No delay by the Company in enforcing any of its rights hereunder shall be deemed a waiver of such rights or shall a waiver by the Company of one of the Consumer's defaults be deemed a waiver of any other or subsequent default.

Should the Consumer at any time be in default in the payment of sums due under the Contract, and should such default continue for thirty (30) days after written notice by certified mail to the Mayor and Clerk of the City of Gallup, New Mexico, from the Company specifying the default and demanding that the same be made good, the Company shall have the right, at its election to declare this Agreement terminated, and if so terminated, the parties shall thereupon be severally released from all obligations hereunder, but in the alternative the Company shall have the right to enforce the obligations hereunder by any available legal or equitable remedy.

Should a dispute arise as to the amount due for power, payment may be held up thirty (30) days in which time an investigation will be conducted and an amount agreed upon by a committee of three, composed of a representative from the Company, a representative from the Consumer, and one neutral party acceptable to both. When payment is deferred according to this paragraph, it shall not be considered a default.

ARTICLE IX

Interruptions of Service:

The Company shall use due diligence in the operation and maintenance of its generating station and transmission facilities so as to furnish the Consumer as nearly as may be a continuous and uninterrupted supply of electric energy, bit it is expressly understood and agreed that the Company shall not be liable to the Consumer hereunder, nor shall the Consumer be liable to the Company hereunder by reason of the failure of the Company or Consumer to deliver, or the Consumer or Company to receive, electric energy as the result of injunction, fire, strike, riot, explosion, flood, accident, breakdown, acts of God, or the Public enemy or other acts beyond the

control of the party affected. This Agreement is to be suspended for the time the Company or the Consumer is for such reason unable to carry out its part of the Contract.

Furthermore, the Company or Consumer shall not be liable for damages occasioned by interruptions are necessary, to make repairs or changes in the Company's or Consumer's generating, transmission, or other equipment.

It is further understood and agreed by the parties hereto that use of Consumer's generating facilities pursuant to provisions of Article IV hereof shall not be considered as an interruption or curtailment of service to Consumer.

ARTICLE X

General:

The Company shall provide such transmission facilities as Consumer may require for taking electric service involved hereunder at the point of delivery to enable the Consumer to take delivery of the power and energy hereunder at the power plant 13.8 KV bus. The Company shall provide all meters and other measuring equipment and wires or other appliances necessary to measure and deliver the amount of such power and energy. All meters, wires, or other appliances furnished by the Company shall remain the property of the Company.

The Company and Consumer mutually agree to maintain their respective systems in a condition which will not interfere with the other party's system. Neither party to this Agreement assumes the duty of inspecting the other party's system, nor be responsible to the other party therefor.

Consumer assumes all responsibility for the electrical power and energy delivered hereunder after it leaves the

Company's lines as well as for the wires, apparatus, and appurtenances used in connection therewith beyond the point of delivery of power and energy hereunder. It is further understood and agreed that the Company shall not be responsible for injury or damage to Consumer's employees in tampering with or attempting to repair and/or maintain any of the Company's lines, wiring apparatus, or equipment on Company's side of point of delivery, or on such meters, appliances, and appurtenances as Company may install on Consumer's premises at or beyond the point of delivery, and Consumer hereby agrees to protect and indemnify Company against all loss, cost, damage, and expenses including attorney's fees by reason of such injury or damage to such employees; and, likewise Consumer shall not be liable for injury or damage to Company's employees where such damage or injury is occasioned by acts of Company's employees in tampering with or attempting to repair and/or maintain any of Consumer's lines, wiring, apparatus, or equipment, and Company hereby agrees to protect and indemnify Consumer against all loss, damage, and expense including attorney's fees by reason of such injury or damage to such employees.

Article XI

Jurisdiction:

During the term of this Contract and any renewal or extensions thereof, the Company agrees, subject always to the laws of New Mexico now or hereafter enacted and to any valid order of the New Mexico Public Service Commission, that the Consumer shall have the following exclusive jurisdiction and territory to provide power and electric service, to-wit:

(a) Within the corporate limits and within the area of five (5) miles beyond such limits, or within 1,000 feet on

either side of the Consumer's existing transmission lines, or 1,000 feet on either side of a transmission line constructed primarily for serving a Consumer owned or operated facility.

(b) Should the corporate limits of the City of Gallup be extended in the future to the extent that its territory for electrical power and distribution as defined in this Article shall include an area being served at the time of such extension with electricity by the Company, then the Consumer shall have the right to serve such new area and territory and the Company shall discontinue such service to such area and territory upon the payment by the Consumer to the Company of a sum of money which shall be equivalent to the Company's actual cost less accrued depreciation of any lines, transmission facilities, equipment furnished or constructed by the Company, located within such new area and territory. At such time as such sum of money shall have been paid by Consumer to Company, Company shall be obliged to deliver a bill of sale transferring ownership of such portion of said transmission line, facilities and equipment. Until such payment is made, the Consumer shall not be entitled to provide service within such new area and territory.

(c) The Company shall not serve any user that is being furnished electrical service by the Consumer at the date of this Contract without the written consent of the Consumer. Nothing contained in this Contract shall be construed as limiting or prohibiting the Consumer from constructing additional generating facilities during the term of this Contract, or obtaining supplemental power and energy from other sources when the load of the Consumer reaches or exceeds 20,000 KW.

ARTICLE XII

Regulation:

This Agreement shall at all times be subject to such changes or modifications by the New Mexico Public Service Commission of the State of New Mexico, or its successors having jurisdiction, as said Commission may from time to time direct in the exercise of its jurisdiction.

It shall be expressly understood that nothing contained in this Contract shall be construed to confer upon said Commission power or jurisdiction to regulate or supervise rates or services of the Consumer to its electrical users, nor does this Article XII change or affect the rights of the Consumer to terminate this Agreement as provided under Article II hereof, and no inspection or supervision fee shall be paid the Commission by the Consumer.

ARTICLE XIII

Successors and Assigns:

This Agreement shall bind and inure to the benefit of the parties hereto, their successors and assigns, but the Consumer shall not assign any of his rights under this Agreement without obtaining the written consent of the Company.

ARTICLE XIV

Execution:

No agreement or representation made by a representative of the Company or Consumer, unless reduced to writing or incorporated herein, shall be binding upon either party.

IN TESTIMONY WHEREOF, witness signature of Consumer, in duplicate originals, in the presence of the

undersigned competent witness on this 30th day of October, 1962.

CITY OF GALLUP
A Municipal Corporation

By

ATTESTED:

City Clerk

WITNESSES:

_____

_____

IN TESTIMONY WHEREOF, witness signature of Company, in duplicate originals, in the presence of the undersigned competent witness on this 15th day of November, 1962.

PUBLIC SERVICE COMPANY OF NEW MEXICO

by

WITNESSES: PRESIDENT

_____

_____

AMENDMENT NO. ONE TO CONTRACT FOR ELECTRIC SERVICE BETWEEN THE CITY OF GALLUP AND PUBLIC SERVICE COMPANY OF NEW MEXICO DATED OCTOBER 30, 1962

THIS AGREEMENT made this 20th day of February, 1968 by and between PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation (hereinafter called "COMPANY"), and the CITY OF GALLUP, a New Mexico municipal corporation (hereinafter called "CONSUMER"),

WITNESSETH:

WHEREAS, the Company and the Consumer heretofore entered into a Contract for Electric Service dated October 30, 1962, and,

WHEREAS, Consumer has requested certain modifications which are agreeable to Company, and

WHEREAS, the modification requested by Consumer will enable Consumer to retire its Gallup Power Plant at Gamerco, New Mexico, which retirement will require Company to provide a point of delivery at the eastern edge of Consumer's service area by July 1, 1969,

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein it is agreed between the parties hereto that the contract designated Contract for Electric Service made the 30th day of October, 1962, be amended to the extent set forth herein.

Section I.

Article II, Paragraph Two, is deleted and the following paragraph substituted therefor:

> The term of this contract shall be twenty five (25) years from and after the date of execution of this Amendment No. One to Contract for Electric

Service; provided, however, that the Consumer shall subsequent to July 1, 1973, have the right to terminate this contract by giving to Company at least forty-eight (48) months advance written notice of termination and pay the Company the sum of One Hundred and no/100 Dollars ($100.00) by good and sufficient check. It is understood and agreed that such notice of termination and payment may be given by Consumer to Company at any time after execution of this contract, but in no event shall the effective date of termination be earlier than July 1, 1977, or earlier than forty-eight (48) months from the date of notice and payment as provided above, whichever shall be later. Notice of termination and payment shall be given by Consumer by certified mailing of said notice and payment to the Company addressed to the Company at its offices in Albuquerque, New Mexico. Such notice shall have incorporated therein a true copy of the resolution duly adopted at a regular meeting of the City Council authorizing such notice and payment, and the notice shall be executed by the Mayor and sealed and attested by the City Clerk.

Section II.

Article II, Paragraph Three, entitled "Change in Rate" is changed by deletion of the date December 31, 1967, and substituting therefor the new earliest effective date of termination, to-wit: July 1, 1977.

Section III.

Article III entitled "Service Characteristics; Lands and Easements" is deleted and the following paragraphs substituted therefor:

Service Characteristics; Lands and Easements:

(A) *Voltage.* The electric power and energy to be furnished to the Consumer by the Company shall be three-phase alternating current at a nominal voltage

of thirteen thousand eight hundred (13,800) volts, and a nominal frequency of sixty (60) cycles per second and shall be delivered to the Consumer at delivery points as described herein or subsequently agreed to.

(B) *Delivery Point One.* Delivery Point One shall bythe Company's thirteen thousand eight hundred (13,800) volt circuit presently located on a tract of ground in the vicinity of the Consumer's Gallup Power Plant. Contract rates of delivery of power to Delivery Point One shall not exceed 20,000 KW unless otherwise agreed upon by the parties. It is recognized by the parties hereto that prior to January 1, 1972, it will be necessary to relocate Delivery Point One to a location on other property owned by the Consumer. The new location of Delivery Point One shall be on property owned by the Consumer in the NW 1/4 of the NW 1/4 of Section 20, T15N, R18W of the City of Gallup, New Mexico, the exact location to be mutually agreed upon by the parties hereto. It is further agreed that each party shall bear the cost of moving their respective facilities of Delivery Point One subject to the terms and conditions of this agreement.

(C) *Delivery Point Two.*

(1) Company agrees to proceed to locate a second delivery point on the eastern edge of Consumer's service area. Said location will be submitted to Consumer and will be established only after the mutual agreement of the parties on the site has been reached. Company agrees to proceed to order all necessary material and equipment for Delivery Point Two and to install same at the location selected by the parties hereto. Company agrees to make every effort, subject to the provisions of Article IX hereof, to have Delivery Point Two in operation in July 1, 1969. Delivery will be made at thirteen thousand

eight hundred (13,800) volts at contract rates of delivery not to exceed 10,000 KW unless otherwise agreed upon by the parties.

(2) Deliveries required by the Consumer at rates in excess of 30,000 KW and the installation of additional delivery points for the Consumer by the Company shall be subject to the mutual agreement of the parties.

(D) *Right-of-Way.* The Consumer hereby agrees, to the extent of its authority and ownership, over and upon land which is owned or controlled by Consumer, to furnish free of cost all rights-of-way and easements for Company's transmission lines and facilities incidental thereto which may hereafter be reasonably required to serve the Consumer, and to furnish the Company and its employees access to the Consumer's premises free of toll or other charges when the employees are on Company business, provided that such land, rights-of-way, easements and access shall be as designated in this Contract or in the absence of such designation, as may be designated in writing from time to time to the Company by the City Manager of the City of Gallup, New Mexico. Company further agrees to save and hold the Consumer harmless from and against all suits, claims, losses, damages, costs and attorney's fees of whatsoever nature that may be based upon or arise out of the Company's performance of this contract or use of such access, right-of-way, easements or property, provided that Consumer shall as promptly as reasonable under the circumstances give written notice to Company after any claim is asserted against Consumer or service of process is made upon Consumer making any claim arising out of the foregoing. Company shall have the right to pay any such claim, compromise any claim or defend any suit brought against Consumer at the

cost and expense of Company. Company agrees to discharge and satisfy any judgment that becomes final arising out of any claim or cause of action which Company is obligated to pay by reason of the foregoing obligation. To the extent of the Consumer's authority, under its present or any future lease with the Gallup-Gamerco Coal Company, the Company is hereby given permission by the Consumer during the continuation of any such agreement to use and occupy the tract of ground measuring approximately 200 feet by 200 feet which Company is presently using as a transformer substation site. Notice is hereby given the Company that under the said lease, all improvements must be removed from said leased premises prior to January 1, 1972.

Section IV.

Article IV of the original contract shall remain in full force and effect until July 1, 1969, and at that time Article IV as written in the original contract shall be of no further force and effect and the following paragraphs shall be substituted therefor:

Generation by Consumer and Contract Power:

(A) The Company agrees to furnish and the Consumer agrees to receive, take and pay for the Consumer's entire electric power and energy requirements in amounts which the Consumer may from time to time require subject to mutual agreement of the parties. It is the intent of the parties that the Company shall plan for and provide the entire power and energy requirements of the Consumer at thirteen thousand eight hundred (13,800) volts during the life of this agreement. The parties shall be mutually responsible for performing the necessary advance planning and thus provide sufficient advance notice prior to requiring additional transmis-

sion facilities, terminal facilities, delivery points or generating capacity.

(B) The Company stipulates and agrees that it is familiar with the present operating procedure of the Consumer's stand-by power plant and that said operating procedure and facilities meet all of the requirements of this Section IV without additional improvement, repair or addition whatsoever. The Company futher agrees and stipulates that should the Consumer find a purchaser for such power plant facilities, that the same may be sold and removed by the Consumer or its vendee, in which case effective upon the first day on which the plant is not available as stand-by that the rates set forth in Section V of this Amendment shall forthwith become effective.

Section V.

Article V entitled "Rates" will be deleted effective as of the day following the first day during which Delivery Point Two is in operation or upon the first day on which the plant is not available for use as set forth in Section IV (B) of this Amendment, whichever shall occur first and thereafter the following paragraphs shall apply:

(A) *Rates:* All power and energy supplied Consumer by Company hereunder shall be paid for by Consumer at the following monthly rate:

A monthly demand charge of:

$2.00 per KW of monthly billing demand determined as hereinafter provided.

Plus a monthly energy charge of:

3.25 mills ($0.00325) per KW for all electric energy delivered to Consumer by Company during the month.

(B) *Monthly Minimum Charge;* The Monthly Minimum Charge for electric service furnished here-

under shall be the charges specified herein but in no case less than $30,000 per month.

(C) *Determination of KW Billing Demand:* The Monthly KW Billing Demand for power received by Consumer from Company shall be the arithmetic sum of the highest fifteen minute integrated or thermal KW demand as measured by standard metering equipment or by calculations based upon measurements made by other types of standard metering equipment at Delivery Points described herein or subsequently agreed to. The billing demand for any month shall be as thus determined, but in no event shall be less than fifty percent (50%) of the highest KW billing demand established during the preceding eleven (11) months, or 10,000 KW whichever is greater.

(D) *Fuel Clause Adjustment:* The above rates are based upon a weighted average cost of all fuel consumed at all of Company's steam electric generating stations existing as of May 1, 1964, (including future additions thereto) during the month immediately preceding the billing period of this schedule of not more than 21¢ per million BTU, nor less than 19¢ per million BTU.

Whenever said monthly weighted fuel cost is above 21¢ per million BTU or below 19¢ per million BTU, the KWH billed under this schedule shall be increased or decreased .012 (twelve one-thousandths) cents per kilowatt-hour for each one cent variation and proportionately for fractional variations in said average fuel cost above 21¢ or below 19¢ per million BTU.

In the event the Company constructs additional generating facilities at a new location, this fuel charge shall be adjusted in accordance with the changed conditions.

(E) *Special Tax and Assessment Clause:* Billings under this schedule may be increased by an amount equal to the sum of the taxes payable under the New Mexico Emergency School Tax Act and of all other taxes, fees, or charges (exclusive of ad valorem state and federal income taxes) payable by the utility and levied or assessed by any governmental authority on the public utility service rendered, or on the right or privilege of rendering the service, or on any object or event incidental to the rendition of the service.

(F) *Use of Service:* The Consumer shall only sell power and energy purchased under this agreement to customers covered by Article XI hereof, or within 1,000 feet on either side of the Consumer's existing transmission lines, or 1,000 feet on either side of a transmission line constructed primarily for serving a Consumer owned or operated facility.

(G) *Power Factor:* This rate for electric service is based upon the Consumer's maintaining a power factor of not less than eighty percent (80%) lagging or leading and is subject to adjustment in accordance with the following:

The monthly Kvar (reactive kilovolt amperes) demand shall be determined by measurement and shall be the highest fifteen minute integrated or thermal Kvar demand measured during the month. The Company will adjust the billing under the above rates as follows: For each Kvar of demand supplied by the Company above or below 0.75 Kvar per kilowatt of billing demand, the monthly bill will be increased or decreased, as the case may be, $0.25 for each Kvar of such variation.

Section VI.

Article VI entitled "Metering" is amended in Paragraph One (1), Line Two (2) to change the word "point" to "points".

Section VII.

Article X entitled "General" is amended to delete entirely the third and last paragraph of Article X and the following paragraph substituted therefor:

> Consumer assumes all responsibility for the electrical power and energy delivered hereunder after it leaves the Company's lines as well as for the wires, apparatus and appurtenances used in connection therewith beyond the point of delivery of power and energy hereunder. It is further understood and agreed that the Company shall not be responsible for injury or damage to Consumer's employees in tampering with or attempting to repair and/or maintain any of the Company's lines, wiring apparatus, or equipment on Company's side of point of delivery or on such meters, appliances and appurtenances as Company may install on Consumer's premises at or beyond the point of delivery except as may be caused by the negligence of Company and Consumer hereby agrees to protect and indemnify Company against all such loss, cost, damage and expenses including attorney's fees by reason of such injury or damage to such employees; and, likewise Consumer shall not be liable for injury or damage to Company's employees where such damage or injury is occasioned by acts of Company's employees in tampering with or attempting to repair and/or maintain any of Consumer's lines, wiring, apparatus, or equipment, except as may be caused by the negligence of Consumer and Company hereby agrees to protect and indemnify Consumer against all such loss, damage and expense including attorney's fees by reason of such injury or damage to such employees.

Section VIII.

Article XI entitled "Jurisdiction" subparagraph (c) shall be amended to delete entirely the last sentence of subparagraph (c).

Section IX.

Article XII, paragraph one (1) shall be deleted and the following paragraph substituted therefor:

> This contract, including the tariff made a part hereof, shall at all times be subject to such changes or modifications as shall be ordered from time to time by any legally constituted regulatory body having jurisdiction to require such changes or modifications.

IN WITNESS WHEREOF, the undersigned have caused these presents to be executed the day and year set forth above.

CITY OF GALLUP, A Municipal Corporation

BY

ATTEST:

PUBLIC SERVICE COMPANY OF NEW MEXICO

BY

ATTEST:

SECRETARY

APPENDIX M

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 51

FEDERAL POWER COMMISSION, PETITIONER

vs.

SIERRA PACIFIC POWER COMPANY

No. 53

PACIFIC GAS AND ELECTRIC COMPANY
PETITIONER

vs.

SIERRA PACIFIC POWER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 51–PETITION FOR CERTIORARI FILED APRIL 20, 1955

NO. 53–PETITION FOR CERTIORARI FILED APRIL 22, 1955

CERTIORARI GRANTED MAY 23, 1955

The Exhibits listed below were offered in Evidence at the Hearings held April 6, 21, 22, 23, 24, 27, 28, 29, 30, May 1, 1953 and March 23 and 24, 1954.

Exhibit No.	*Description of Document*	*Record Vol.*	*Record Page*	*Ag*
1	Cross-Reference to PG&E Rate Schedule FPC No. 3 and Supplement No. 1 thereto	7	1467	1
4	Excerpt—Comparative Statement of PG&E's Sales and Revenue by months under present and proposed rates for service to Sierra	7	1503	1
5	Excerpts—PG&E's Rate Schedule FPC No. 3, the Contract of March 4, 1948 between PG&E and Sierra	7	1550	1
9	Excerpts—Decision of California Railroad Commission of Oct. 16, 1945	7	1581	1
10	Excerpts—Testimony taken before the California Railroad Commission on Sept. 13, 1945 .	7	1587	1
	B. B. Beckett—Direct .	7	1589	1
	B. B. Beckett—Cross .	7	1599	1
11	Excerpts—Series of letters between PG&E and Sierra, dated from May 13, 1946 to Sept. 3, 1947	7	1611	1

12	Excerpts—Testimony taken before the California Public Utilities Commission on April 15, 1948 for approval of contract of March 4, 1948 between PG&E and Sierra .	8	1650	1
	James F. Pollard—Direct	8	1652	1
	James F. Pollard—Cross	8	1663	2

EXCERPTS FROM EXHIBIT 5

[1550]

THIS AGREEMENT made by and between Pacific Gas and Electric Company, a California corporation, hereinafter called Pacific, and Sierra Pacific Power Company, a Maine corporation, doing business in the State of California, hereinafter called Sierra,

WITNESSETH that:

WHEREAS Pacific owns and operates two 60 kv circuits delivering power from its Druin and Spaulding generating plants, respectively, to Summit, all in Placer and Nevada Counties, State of California, each of said circuits having a capacity of 15,000 kw and both of said circuits combined having a capacity of 30,000 kw of electric energy for delivery to Sierra; which is sufficient to meet Sierra's present demands on Pacific of approximately 29,000 kw; and

WHEREAS, the parties hereto have heretofore entered into an agreement dated June 6, 1938, hereinafter called Former Contract, pursuant to which Pacific promised to sell and deliver to Sierra and Sierra promised to purchase and receive from Pacific electric energy, during a period

expiring November 1, 1953, for use in the conduct of Sierra's utility electric business, and Sierra had the right

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to purchase power from other parties than//Pacific subject to payment to Pacific, in addition to a prescribed standby charge, of a sum of not less than $75,000.00 for each year during which such purchases might be made from other parties; and

WHEREAS, the parties hereto desire to supersede said Former Contract by the agreement herein set forth.

NOW, THEREFORE, in consideration of the premises and of the respective promises of the parties hereto, they mutually agree as follows, to-wit:

1. Pacific shall sell and deliver to Sierra and Sierra shall purchase and receive from Pacific all of the electric energy which Sierra shall, during the term hereof, require for resale to its customers and for use in the conduct of its electric business, except such electric energy as Sierra may generate in its existing electric generating plants, and such quantity of electric energy as Sierra now purchases or may hereafter purchase from others under minor standby and minor exchange agreements.

2. All electric energy delivered and received hereunder shall be three-phase, sixty cycle, alternating current, and shall be delivered and metered at a nominal electromotive force of approximately 60 kv and 110 kv, slight variations in frequency to be allowed. Points of delivery and metering to be as hereinafter provided.

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3. All of such electric energy shall be sold and delivered to and purchased and paid for by Sierra in accordance with Pacific's applicable rules and regulations

duly and regularly established from time to time by or under authority of law and on file with the Public Utilities Commission of the State of California.

4. For all electric energy delivered hereunder, Sierra will pay Pacific in accordance with the following schedule of rates:

Demand Charge

First, 2,000 kw of maximum demand $1,338.75 per month

All excess kw of maximum demand .34 per kw per month plus

Standby Charge

For not more than 4,000 kw payable in equal monthly installments $30,000.00 per year

plus

Energy Charge

First	150 kwh per kw per month	6.79	mills per kwh
Next	150 " " " " "	4.85	" " "
All Over	300 " " " " "	3.88	" " "

Except that for all energy furnished in excess of 8,000,000 kwh per month, the above energy rates shall be reduced by .485 mills per kwh.

Minimum Charge

Applicable when the maximum demand in the current month or in the preceding 11 months has exceeded 25,000 kw: $1.00 per month per kw of such maximum demand

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Special Conditions

(a) *Demand:* The maximum demand in any month will be the average kw delivery of the 30-minute interval in which such delivery is greater than in any other 30-minute interval in the month. The maximum demand to be used in computing charges under the above rates will be the mean of the actual maximum so determined for the current month and the highest such demand occurring in the year ending with the current month.

(b) *Off Peak Demand:* Demands occurring between 10:30 P.M. of one day and 6:30 A.M. of the next following day, and on Sundays and legal holidays, will be ignored in determining the demand used for computing charges.

(c) *Power Factor:* The total charge for any month as computed on the above rates will be decreased or increased, respectively, by 0.25% (0.2% if energy used in the month exceeded 8,000,000 kwh) for each 1% that the average power factor of customer's load in that month was greater or less than 85%, such average power factor to be computed (to the nearest whole per cent) from the ratio of lagging kilovolt-amphere-hours to kilowatt-hours consumed in the month, provided, however, that no power factor correction will be made for any month when customer's maximum demand was less than 10% of the highest in the preceding eleven months.

Sierra shall at all times so conduct its operations that the power factor at the time of peak loads each day at the point of delivery hereunder shall not be less than 95%.

5. The standby requirements of Sierra may at the option of either party hereto be reviewed and adjusted at

the end of each successive three (3) year period during the term hereof.

In the event that during any such three (3) year period it shall be demonstrated by actual experience that Sierra's standby requirements exceed 4,000 kilowatts, then such

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greater number // of kilowatts shall be deemed to be the standby requirements of Sierra and the standby charge shall be increased proportionately until again adjusted, as provided in the preceding paragraph, to such lesser or greater number of kilowatts and standby charge as may be mutually agreed upon.

6. Sierra shall upon receipt of bill therefor pay Pacific monthly at its office in San Francisco, California, for all electric energy delivered hereunder.

7. Pacific shall, at is sole cost and expense, construct a three phase, 110 kv pole and wire electric transmission line (hereinafter call first 110 kv line) of a capacity of approximately 40,000 kw, extending from its Drum Power House to the said point of delivery at Summit, and shall endeavor to complete the same ready for operation by October 1, 1949, or as soon thereafter as circumstances permit, which first 110 kv line shall at all times be and remain the sole property of Pacific. Inasmuch as it will be impracticable, on account of winter and other conditions existing at Summit, for Pacific to build, maintain and operate a substation at Summit for the purpose of transforming said electric energy from 110 kv to 60 kv for delivery hereunder, after said first 110 kv line of Pacific shall have been constructed, it is therefor agreed that Sierra will, at its sole cost and expense, construct a three phrase, 110 kv pole and wire electric transmission line, of approximately 40,000 kv capacity

[1555]

(hereinafter called Sierra's first 110 kv line) extending // from Summit to a substation to be constructed by Sierra at a convenient point within the State of California, and Sierra will also construct said substation (hereinafter called California Substation) with a capacity of 40,000 kow for the purpose of reducing from 110 kv to 60 kv the voltage of the power to be transmitted over Sierra's first 110 kv line. Sierra's first 110 kv line and California Substation shall at all times be and remain the sole property of Sierra, and shall be operated and maintained by it. In consideration of the construction, operation and maintenance by Sierra of Sierra's first 110 kv line and California Substation, Pacific will pay to Sierra each month, from the date said line and substation are placed in operation and for the remaining term of this agreement, (however not to exceed a period of fifteen (15) years,) a sum equal to 1/12 of annual costs of operation of said substation, plus 1/12 of the annual fixed charges for interest, depreciation, maintenance and taxes, based on the installed cost of said substation. The amount of said annual fixed charges for this purpose shall be deemed to be 10% of Sierra's investment in said substation (estimated to be approximately $300,000.00), but in no event shall the combined 1/12 of said costs of operation and of said fixed charges exceed $2,500.00 per month.

8. If at any time during the term hereof Sierra shall require more power and electric energy than Pacific can

[1556]

supply reasonably through the said two existing 60 kv lines and Pacific's said first 110 kv line, to be constructed by it hereunder as aforesaid, then Pacific shall either construct, maintain and operate a second 110 kv transmission line to Summit, or convert one of said existing 60

kv lines to 110 kv, (either of which lines, as shall be thus constructed or converted, shall hereinafter be designated second 110 kv line), and Sierra will, correspondingly, either construct a second 110 kv transmission line, or will convert to 110 kv one of Sierra's existing 60 kv lines, in order to receive the electric energy which Pacific will deliver from said second 110 kv line to Serra at Summit, provided that if such further construction or conversion of said second 110 kv line is required of Pacific after January 1, 1950, Sierra will then extend the present contract for a period of fifteen (15) years from the date when said second 110 kv lines goes into service. In the event that further additions to the capacity of California Substation, or any other 110/60 kv substation, are required by reason of the construction of second 110 kv line, said additions shall be constructed, operated, and maintained by Sierra without any additional compensation from Pacific.

9. All electric energy purchased hereunder shall be delivered to Sierra at the point where Pacific's lines contact those of Sierra at the location known as "Summit"

[1557]

in Placer // County, California. All electric energy delivered hereunder from Pacific's existing two 60 kv circuits to Sierra's 60 kv lines shall be metered at Summit, and all electric energy delivered hereunder from Pacific's first 110 kv line, when constructed as hereinbefore provided, shall, for the mutual convenience of the parties hereto, be metered at 60 kv at California Substation. If during the term hereof, Pacific shall be required, as hereinbefore provided, to construct a second 110 kv line, then Pacific shall deliver and meter at 110 kv at Summit such electric energy as is delivered by means of said second 110 kv line. The readings of all meters referred to in this Section

9 shall be combined, and simultaneous demands shall be used, for billing purposes hereunder.

10. Sierra, in the event of selling, leasing, or otherwise disposing of its business of selling electric energy, may assign this agreement to the lessee or purchaser thereof, provided such lessee or purchaser shall have assumed and convenanted to perform this agreement but otherwise Sierra shall not assign this agreement without Pacific's written consent.

11. This agreement shall be and remain in full force and effect until December 31, 1964, or fifteen (15) years after the date when the first 110 kv line goes into service, whichever is later, unless extended as herein provided, and this contract shall supersede said Former Contract.

[1558]

12. This agreement shall become effective as of January 1, 1948, upon the procurement of an order by the Public Utilities Commission of the State of California authorizing the parties hereto to carry out the terms and conditions hereof. This agreement shall at all times be subject to such changes and/or modifications as said Commission may from time to time direct in the exercise of its jurisdiction.

Time is of the essence of the respective provisions hereof.

IN WITNESS WHEREOF the parties hereto have executed these presents in duplicate this 4th day of March, 1948.

SIERRA PACIFIC POWER COMPANY,

By F. A. Tracy
Its President

and by H. P. Danton
Its Assistant Secretary.

PACIFIC GAS AND ELECTRIC COMPANY,

By N. R. Sutherland
Its Vice President in Charge of
Public Relations and Sales

and by Raymond Kindig
Its Secretary

Approved

James F. Pollard
Manager Commercial Department

Approved as to Form
R. E. Sloane
Attorney

APPENDIX N

PROCEEDINGS

PRESIDING JUDGE: The hearing in the case of Public Service Company of New Mexico, Docket No. E-9454, will please come to order.

Are there any preliminary matters?

(No response)

PRESIDING JUDGE: If there are none, I have made a decision with respect to the motions made by Staff and by Public Service Company of New Mexico.

There are two issues involved, but I will deal with them in a tripartite way.

The first relates to the evidence proffered by the City of Gallup, purporting to show the rates currently in effect are not adverse to the public interest.

This proceeding is controlled by the Commission's edict issued on two occasions sometime ago, to the effect that the standard for determining the appropriateness of the rates is the standard of justness and reasonableness, and that it would not be necessary for the Company to shoulder the heavier burden imposed by the Sierra-Mobile precedents. The Company has made no effort to make a showing that the rates it is currently collecting from the City of Gallup are adverse to the public interest. It has relied on its showing of justness and reasonableness. And in my colloquy with Counsel yesterday it was made altogether clear that the Company is making no argument that the rates it is collecting from the City of Gallup are adverse to the public interest.

Now, the City of Gallup is attempting to anticipate arguments that may or may not be made as the case progresses through the various levels of trial and review.

However, anticipation of arguments is hardly a basis for the receipt of evidence that is otherwise outside the scope of the proceeding. And I think it is fairly certain that the determination is going to be made by the Court of Appeals, I believe of the Tenth Circuit, which has the case.

If the Court of Appeals agrees with the Commission as to the standard of justness and reasonableness, that will end the problem. If, on the other hand, the Court of Appeals reverses the Commission and holds that the criterion for the determination of the propriety of the proposed rates is whether the current rates are adverse to the public interest—I should perhaps correct myself—if the Court of Appeals holds that Public Service Company of New Mexico's entitlement to proceed with its proposed rates is dependent on a showing of adversity to the public interest, then it seems to me, in light of the Commission's holding with respect to the proper standards, and in light of the further fact that the City of Gallup has in effect proffered proof that the current rates are not adverse to the public interest, proof which is here being rejected, in light of those facts I think it is fairly certain that the case will have to be remanded for a hearing on the issue of adversity to the public interest.

There are, while I will consider the testimony and exhibits submitted by the City of Gallup in this respect as an offer of proof, I am granting the motion to strike with respect to those exhibits and that testimony.

We come now to the question of rate of return. I want to deal with that on two bases.

First of all, the case was remanded to me by the Commission, and the City of Gallup argues that there was sufficient notice and reservation in its application to the

Commission to cover issues other than the two that were specifically mentioned, namely, the cost of coal and the squeeze issue. However, whatever general language was used by the City of Gallup, and whatever language was used by the Commission, it is my reading of both—and I think it is fairly clear—that only those two issues were in mind. And I think it would be improper on my part to attempt to read into either the application or the order any general statements which in these circumstances I would analogize to the very fine print in a contract, to which too much attention is not generally paid.

I think in a situation of this kind an argument that more than the specified issues were covered has to rest on something with far greater specificity than the mere generalizations that may have been contained either in the application or the order.

No. 80-1217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF GALLUP,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT PUBLIC SERVICE COMPANY OF NEW MEXICO IN OPPOSITION

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February 20, 1981

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit properly determined that the interpretation by the Federal Power Commission and the Federal Energy Regulatory Commission of the intent of the parties to a contract was factually and legally supported.

PARTIES TO THE PROCEEDINGS BELOW

City of Gallup, New Mexico
Federal Energy Regulatory Commission
Public Service Company of New Mexico

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT PUBLIC SERVICE COMPANY OF NEW MEXICO IN OPPOSITION

OPINIONS BELOW, JURISDICTION AND STATUTORY PROVISIONS

The Opinions Below, Jurisdiction and Statutory Provisions requisites are adequately set forth in the petition for a writ of certiorari ("Petition").

STATEMENT OF THE CASE

On April 21, 1975, Public Service Company of New Mexico ("PNM") filed with the Federal Power Commission ("FPC" or "the Commission")[1] a proposed rate schedule supplement with respect to the City of Gallup ("Gallup") pursuant to § 205 of the Federal Power Act, 16 U.S.C § 824d (1970). Gallup objected and the FPC held, in an "Order Denying Motion to Reject, Instituting Section 206(a) Proceeding, Granting Interventions, And Establishing Dates," Docket No. E-9454, that the existing contract did not permit a unilateral rate change, and that the FPC would have to determine a just and reasonable rate in an adjudicatory proceeding as provided by § 206 of the Act, 16 U.S.C. § 824e. Appendix to Petition ("App.") 45. The FPC also held, however, that "the procedures under such a Section 206(a) proceeding would not entail meeting the heavy burden of proof associated with the *Mobile-Sierra* decisions." App. 49 n.5.[2]

Both PNM and Gallup petitioned for review. In PNM's appeal, the United States Court of Appeals for the Tenth Circuit affirmed the FPC, stating with regard to the language of the contract between PNM and Gallup that "the reference therein to changes ordered by a regulatory body ... points toward a change after a § 206 proceeding, not a § 205 unilateral filing." *Public Service Co. of New Mexico v. FPC*, 557 F.2d 227, 232 (1977). In that opinion, the Tenth Circuit also

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[1]The term "Commission" shall also be used to refer to the FPC's successor — the Federal Energy Regulatory Commission ("FERC").

[2]United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956), and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

dismissed, as prematurely brought, Gallup's petition for review with respect to the burden of proof which the FPC had decided PNM should carry in the § 206 proceedings to be held.

While the matter was pending before the Court of Appeals, the Commission commenced the § 206 proceeding to determine the just and reasonable rate. The Staff submitted cost of service evidence which justified a revenue increase of $615,000 and Gallup filed testimony showing a cost of service calling for an increase of $544,000. PNM Appendix ("PNM App.") 2. In order to obtain at least some relief on an expeditious basis, PNM accepted the increase shown by Gallup, and formally submitted an offer of settlement, which Staff accepted. *Id.*

Despite the fact that the settlement was based on Gallup's own figures, Gallup objected to the settlement on the ground that there were factual issues outstanding which barred acceptance of the settlement. By order dated September 8, 1976, the Commission rejected the proposed settlement, stating that it was "unable to accept all of Gallup's factual allegations and still approve the settlement rates as just and reasonable on this record." PNM App. 3-4.

Additional hearings were held and it was not until October 20, 1977 that the Administrative Law Judge's Initial Decision on Application for Rate Increase was entered. On July 5, 1978, the Commission affirmed the Initial Decision of the Administrative Law Judge and approved PNM's revised rate schedule. On December

15, 1978, the Commission entered an Order denying both Gallup's and PNM's requests for rehearing.[3] Gallup thereupon filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit on December 18, 1978, No. 79-1274, and on motion by the Commission, that Court transferred the matter to the Tenth Circuit on March 28, 1979.

The second petition for review filed by Gallup, No. 79-1275, arose from other FERC orders relating to an additional rate change request which PNM filed with the Commission on April 21, 1978 in Docket No. ER 78-338. That rate proposal was pursuant to the same contract between PNM and Gallup which was interpreted by the FPC in Docket No. E-9454 and by the Tenth Circuit in 1977 in *Public Service Co. of New Mexico v. FPC, supra*. On June 30, 1978, FERC entered an Order which, *inter alia*, directed, as had the FPC in its July 1975 Order, institution of proceedings to determine a just and reasonable rate. Gallup once again petitioned for rehearing, contending that the decision of the FPC as to the burden of proof PNM must satisfy should not be followed because there was now new material before the Commission. On December 15, 1978, FERC issued an "Order on Rehearing Denying Requested Relief" to Gallup, and expressly approved the FPC's 1975 interpretation of the contract. The Commission explained that:

> the parties did not intend to allow a change in rates by unilateral filings under Section 205, but

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[3]PNM sought rehearing on the ground that the Commission's decision that PNM was required to file the coal contract between it and Western Coal Company with the Commission was erroneous. PNM filed a Petition for Review with the Tenth Circuit and in another part of the opinion, not now before this Court, the Tenth Circuit set aside those parts of the FERC's Orders which directed PNM to file the contract.

> only by "order" of the Commission, i.e., a change in rates prospectively after a Section 206(a) proceeding. Since the parties have prescribed a method for changing the rates there would be no need for the Commission to act under the overriding public interest standard enunciated in *Sierra* which only applies where the parties do not provide for any change in rates. Therefore, the *Sierra-Mobile* burden of proof does not apply to these proceedings. Gallup's petition for rehearing shall be denied. App. 44 (footnote omitted).

Gallup also sought review of this determination from the D.C. Circuit, but that petition was similarly transferred to the Tenth Circuit.

In its opinion affirming the Commission's interpretation of the terms of the contract between Gallup and PNM, the Court of Appeals found the Commission's determination that the contract was not a "fixed rate" contract to be reasonable. The Commission's determination was buttressed by the decision of the Fifth Circuit in *Louisiana Power & Light Co.* v. *FERC*, 587 F.2d 671 (1979) which examined similar language and also reached the conclusion that a fixed rate contract was not involved.

REASONS FOR DENYING THE WRIT

I. The sole issue presented by the Petition is the correctness of the Commission's interpretation of the intent of the parties to a contract.

The issue in this case is one of interpretation of the parties' intent in a contract — whether PNM and Gallup, in providing that rate changes would be accomplished

through a § 206 proceeding,[4] also contemplated that the § 206 "just and reasonable" standard would apply. Gallup contends that the *Sierra* burden of proof should apply rather than the "just and reasonable" standard on the ground that the instant contract is of the fixed rate type. Gallup argues that the Commission and the Tenth Circuit "have assumed away the very issue presented by this petition: whether the Commission may ever raise rates above those fixed by contract without first making the finding required by *Sierra*." Petition at 12. However, it is Gallup which has assumed the response to the threshhold issue — whether the parties intended the contract involved to be a single fixed rate contract. Only if the parties so intended does *Sierra* even apply. The Commission found to the contrary that the contract was not of the fixed rate variety and the Tenth Circuit affirmed.

The fundamentally factual question of the intent of the parties to a contract is one upon which the Commission is entitled substantial deference and one which does not merit review by this Court. The courts have held that:

> [a]lthough application of the *Mobile-Sierra-Memphis* principles to a given contract is primarily a matter of law, where the decision involves the interpretation of the parties' intent as revealed in the language of a contract, it is proper to defer to the Commission's expertise if its decision is "amply supported both factually and legally."

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[4]In its 1977 decision involving the same contract, the Tenth Circuit held that the provisions of the contract pointed "toward a change after a § 206 proceeding." Public Service Co. of New Mexico v. FPC, 557 F.2d 227, 232.

Gulf States Utilities Co. v. FPC, 518 F.2d 450, 457 (D.C. Cir. 1975), *quoting, United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 114 (1958).

In addition, it is for the Court of Appeals and not for this Court to determine whether the Commission's decision is "amply supported." As the Court said in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951):

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

The instant case does not present such a "rare instance when the standard appears to have been misapprehended . . . ." Indeed, as illustrated below and in II *infra*, the Tenth Circuit's decision is consistent with the Court's *Sierra* decision and with the decisions of all other Circuits. Accordingly, there is no issue that merits review by this Court.

Gallup's contention that the contract in question is of the "fixed rate" type to which the *Sierra* burden of proof applies is premised upon the fundamentally unsound argument that "[b]y its terms, the *Sierra* decision applies to all contracts not unilaterally modifiable by a utility under Section 205 procedures." Petition at 14. The Commission and the Courts of Appeals have recognized that the two possibilities represented by the *Sierra-Mobile* and *Memphis* cases do not exhaust the range of agreements with respect to rate changes which parties could reach.

In *Sierra* and *Mobile*, the Court rejected the argument that the provisions of the Natural Gas Act and Federal Power Act provided a basis for one party to a contract unilaterally to change the terms of the contract. *E.g.*, 350 U.S. at 344. The Court agreed, however, that the Natural Gas Act and the Federal Power Act did vest in the Commission the power to change contract rates if the public interest so required. The statutory goal is not to permit a party to elude the effects of a poor bargain, but to protect the public interest by keeping the utility operating. Naturally, the Court held that such intervention to alter the terms of the parties' contract is appropriate only under exigent circumstances.[5] The other end of the spectrum from *Sierra* is exemplified by the Court's decision in *United States Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958). If the parties have in fact agreed to a unilateral increase in rates, their bargain will likewise not be subject to interference.

The principles established by this Court in the *Mobile*, *Sierra* and *Memphis* cases have been expressed as follows:

> The rule of *Sierra*, *Mobile* and *Memphis* is refreshingly simple: The contract between the parties governs the legality of the filing.

Richmond Power & Light Co. v. FPC, 481 F.2d 490, 493 (D.C. Cir.), *cert. denied, sub nom., Indiana & Mich. Elec. Co. v. Anderson Power & Light Co.*, 414 U.S. 1068 (1973).

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[5]Examples of the type of circumstances justifying relief cited by the *Sierra* Court were when the rate is so low "as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." 350 U.S. at 355.

> The Supreme Court's decisions in *Mobile* and *Sierra* establish beyond peradventure that efforts to alter rates are governed by the parties' contracts, subject only to the overriding power of the Commission to readjust contract rates in the public interest.

Kaukauna v. FERC, 581 F.2d 993, 996 (D.C. Cir. 1978) (footnotes omitted).

The same courts which have emphasized the *Sierra* principle that the terms of the contract must control the validity of any rate change have also expressly rejected Gallup's contention that the *Sierra* burden applies to any contract not unilaterally modifiable. The court in *Richmond Power & Light Co. v. FPC* stated that the parties, consistent with the *Mobile-Sierra-Memphis* doctrine, may "agree to a specific rate or . . . to a rate changeable in a specific manner." 481 F.2d at 497. With respect to contracts which can be changed in a specified manner, the court stated:

> We see no reason why the integrity of this contractual undertaking is any less deserving of protection under the Act than one for a single fixed rate. 481 F.2d 490, 497.

In *Kaukauna* v. *FERC,* 581 F.2d at 996, the court stated, citing *Richmond,* that:

> And as we ourselves have held, the parties may extend the protection of the contract to the mechanics of rate change as well as to the permissibility of any change at all.

In the instant case, the Commission found that the contract was not one establishing a fixed rate, but was instead one which, as the court in *Richmond* put it, is "changeable in a specific manner," and therefore does not require application of the *Sierra* burden of proof. The FERC interpreted the intent of the parties in the instant case as being that:

> the parties did not intend to allow a change in rates by unilateral filings under Section 205, but only by "order" of the Commission, i.e., a change in rates prospectively after a Section 206(a) proceeding. Since the parties have prescribed a method for changing the rates there would be no need for the Commission to act under the overriding public interest standard enunciated in *Sierra* which only applies where the parties do not provide for any change in rates. Therefore, the *Sierra-Mobile* burden of proof does not apply to these proceedings. App. 44 (footnote omitted).

This construction is consistent with the Commission's interpretation of similar language in other cases. In *Central Kansas Power Co.*, 52 FPC 933, 934-935 (1974), the Commission stated:

> A prerequisite to imposition of the *Sierra* burden, however, is a finding by the Commission that an applicant's rate filing is in contravention of the contractual provisions under which service is being rendered. Such a finding cannot be made in this case, for both parties agreed that the rate might be increased

> or decreased "by any regulatory body having jurisdiction with respect thereto." By including this provision, the parties were agreeing that the contract could be changed prospectively after a proceeding similar to a proceeding under Section 206 of the Federal Power Act. Our institution of a Section 206 investigation is, therefore, entirely consistent with the contractual provisions for which the parties have bargained.[6]

In affirming the Commission's interpretation of the contract, the Tenth Circuit also looked to the Fifth Circuit's decision in *Louisiana Power & Light Co.* v. *FERC*, 587 F.2d 671 (1979).[7] The Fifth Circuit affirmed the Commission's conclusions that what the parties had

> "bargained for and obtained [was] a contractual authorization for a section 206(a) proceeding with its just and reasonable standard of proof."
>
> In reaching that conclusion, the Commission gave a sensible, practical construction to the

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[6]*Accord*, Missouri Power & Light Co., No. ER 76-539 (Opinion No. 31-A, May 16, 1979); Indiana & Michigan Elec. Co., 52 FPC 259, 262 (1974), *aff'd*, Indiana & Michigan Elec. Co. v. FPC, 530 F.2d 1060 (D.C. Cir. 1976); Southern California Edison Co., 53 FPC 921, 922 n.1 (1975), *aff'd without opinion*, Southern California Edison Co. v. FPC, 535 F.2d 1325 (D.C. Cir. 1976).

[7]The Louisiana Power & Light contract referred to rate changes "in accordance with a valid applicable order of any governmental regulatory authority having jurisdiction hereof." Louisiana Power & Light Co. v. FERC, 587 F.2d at 676. The PNM-Gallup contract referred to changes "by any legally constituted regulatory body having jurisdiction to require such changes." Public Service Co. of New Mexico v. FPC, 557 F.2d at 231 n.10.

> contract language in dispute. This interpretation recognizes the likelihood that the parties negotiated a compromise between the *Sierra-Mobile* fixed rate contract, favorable to the customer, and the type of agreement involved in *Memphis,* which allows the utility to take unilateral action to increase charges. Under such an arrangement, a change in rates is not precluded, but "the manner in which such a change may be effected is contractually established," Commission Order, September 30, 1977; contracting for a section 206(a) proceeding preserves the utility's right to seek new rates, while assuring the customer that any increase requires Commission approval and can only take effect prospectively. *Id.* at 676.

The Tenth Circuit also emphasized that the Commission's interpretation of the instant contract was reasonable because the PNM-Gallup contract contained the additional provision in Article II permitting Gallup the option to terminate the agreement within 90 days should the rates "be increased 'for any reason whatsoever' . . . ." *Public Service Co. of New Mexico* v. *FERC,* 628 F.2d at 1270. Such a system for changes in rates is reasonable, and a contrary construction that a contract is of the fixed rate type is unreasonable when the term of the contract is for as long a period (25 years) as in the instant case.

The Commission's construction of the parties' intent is thus "amply supported both factually and legally," *Gulf States Utilities Co.* v. *FPC,* 518 F.2d 450, 457 (D.C. Cir. 1975), *quoting, United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.,* 358 U.S. 103, 114 (1958). The Court of Appeals' determination that the Commission's construction of the contract was valid

should accordingly not be subject to review by this Court. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951).

II. There is no conflict with other Circuits.

As described above, the Fifth Circuit, in *Louisiana Power & Light Co.* v. *FERC,* 587 F.2d 671 (1979) reached a conclusion perfectly consistent with that of the Tenth Circuit in the instant case. Gallup seeks to create a conflict with the District of Columbia Circuit by relying on a number of decisions by that court. However, in two of the decisions cited by Gallup, *Papago Tribal Utility Authority v. FERC,* 610 F.2d 914 (1979) and *Oglesby v. FERC,* 610 F.2d 897 (1979), the court expressly stated that although it believed that the contract language in question pointed to a § 206 proceeding, it was not deciding, because it was not presented, whether "the rigorous *Sierra* burden of proof must be employed ..." *Papago Tribal Utility Authority* v. *FERC,* 610 F.2d at 930 n. 127; *Oglesby v. FERC,* 610 F.2d at 901 n.20.

As for the third case, *Richmond Power & Light Co.* v. *FPC,* 481 F.2d 490 (1973), as described above, that case clearly supports the decision of the Tenth Circuit that a contract providing for "a rate changeable in a specific manner" is entitled to protection. 481 F.2d at 497. Gallup's reliance on language taken from the second half of the *Richmond* case is entirely unwarranted.[8] It is readily apparent from the sentence immediately following the language quoted by Gallup, Petition at 13 n.8, that the court was not focusing on whether the parties had contracted for a § 206 change. Indeed, the court explicitly said that this was beside the point. The

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[8]The court treated two consolidated appeals in the opinion—one by Richmond Power & Light and the second by Anderson Power & Light.

question presented was whether the utility had the right, under § 205 and the Supreme Court's decision in *Memphis* to unilaterally change the rate.[9]

The subsequent history of the *Richmond* case is also instructive. On remand, the Commission stated that:

> We would note that the procedures under such a Section 206 proceeding would not entail meeting the heavy burden of proof associated with the *Mobile-Sierra* decisions. As all parties concede, these contracts clearly contemplate that the Commission may order a change in rates; that is, the rates are not fixed for the term of the contract, only the manner in which such a change may be effected is contractually established. Accordingly, our examination of I&M's proposed rates would still be on a basis of our cost-plus-fair return standard. Cf: *Southern California Edison Company*, Docket No. E-8176, order issued September 21, 1973, 50 FPC 836.

Indiana & Michigan Elec. Co., 52 FPC 1752, 1755 n.11 (1974). Again, although the precise question of the burden of proof was not expressly presented to the court, when the D.C. Circuit reviewed the above order, the court broadly affirmed the Commission's interpretation of the contract and application of the *Sierra-Mobile* doctrine by stating that:

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[9]The Commission's decision in Carolina Power & Light Co., 47 FPC 1 (1972), also relied on by Gallup, Petition at 13 n.9, is inapposite for the identical reason. The portion of the opinion quoted by Gallup clearly discloses that the issue was whether the contractual language in question established that a unilateral rate increase was available.

> The Commission's reasoning is set forth in its opinion. It suffices to say that this is a matter in which the Commission has some latitude to interpret the contracts. Its 1974 opinion reflects a reasonable course in applying our *Richmond* opinion to the contracts of the cooperatives . . .

Indiana & Michigan Elec. Co. v. FPC, 530 F.2d 1060, 1062 (1976).

The issue was directly presented to the D.C. Circuit in *Marceline v. FERC*, No. 79-1740 (June 21, 1980). The Commission had held that the contract provided for a rate change after a § 206 proceeding and that the *Sierra* burden of proof did not apply. *Missouri Power & Light Co.*, No. ER76-539 (Opinion No. 31-A, May 16, 1979). PNM App. 7. Marceline argued to the Court of Appeals, *inter alia*, that the contract was a fixed rate contract. In an unpublished order, the D.C. Circuit affirmed without opinion.[10] PNM App. 9.

Finally, there is no conflict between the Tenth Circuit and the D.C. Circuit's decision in *Boroughs of Chambersburg v. FERC*, 580 F.2d 573 (1978). The court there was defining a fixed rate contract in contrast to the other extreme of a "going rate" contract as contemplated by this Court's decision in *Memphis*. Compare 580 F.2d at 574 n.2 with n.3. The *Chambersburg* court in no way sought to overrule the D.C. Circuit's previous decision in *Richmond* which drew the distinction between a rate changeable in a specific manner and a single fixed rate contract. 481 F.2d 490, 497. The *Chambersburg* case offers no support for Gallup's contention that the *Sierra* burden of proof applies to all

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[10]Although under that Court's rules, an unpublished order is without precedential effect, *Marceline* at the least establishes an absence of conflict with the D.C. Circuit.

contracts not unilaterally modifiable. Petition at 14. Indeed, *Kaukauna v. FERC,* 581 F.2d 993 (D.C. Cir. 1978), decided after *Chambersburg,* expressly reaffirmed *Richmond* that contracts which were changeable in a specific manner were not fixed rate contracts. *Id.* at 996.

Thus, the conflict among Circuits asserted by Gallup simply does not exist. To the contrary, as established immediately above and in I *supra,* the decisions of the Fifth and D.C. Circuits fully support the determination reached by the Tenth Circuit in the instant case.

CONCLUSION

For the foregoing reasons, Respondent PNM respecfully submits that the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Public Service Company of New Mexico	))	Docket No. E-9454

ORDER REMANDING SETTLEMENT FOR HEARING AND GRANTING MOTION FOR HEARING ON PRICE SQUEEZE ISSUE AND ESTABLISHING PROCEDURES

(Issued September 8, 1976)

On May 21, 1975, Public Service Company of New Mexico (PNM) tendered for filing a proposed rate schedule that would increase revenues from its jurisdictional customer, the City of Gallup, New Mexico (Gallup) by about $848,000. On June 30, 1975, Gallup filed a petition to intervene alleging, *inter alia*, that PNM's rate filing was non-competitive and discriminatory when considered in relation to its retail rates and when considered in relation to another wholesale customer, Community Public Service Co. (CPS).[1]

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[1]Gallup also objected that any rate increase filing is precluded by the contract terms and the *Sierra-Mobile* doctrine. PNM contended a unilateral price change is permissable under the contract. The Commission denied each of their contentions on July 31, 1975, and denied rehearing on September 26, 1975. Both appealed, *Public Service Co. of New Mexico, et al.* v. *F.P.C.*, 10th Cir., Nos. 75-1692, 76-1013.

By order of July 31, 1975, the Commission instituted an investigation under Section 206 of the Federal Power Act to determine a just and reasonable rate for PNM's service to Gallup. The order excluded consideration of the price squeeze issue pending Supreme Court review of *Conway Corporation* v. *F.P.C.*, 519 F.2d 1264 (1975), affirmed, 44 U.S.L.W. 4777 (June 7, 1976). On January 7, 1976, the Presiding Administrative Law Judge certified a proposed settlement of this matter to the Commission. This settlement is opposed by Gallup.

PNM's settlement proposal is based upon the cost of service study prepared by Gallup which Gallup served on all parties on November 4, 1975, for later submittal in evidence at the hearing. It meets the lowest cost of service study prepared by the parties and would permit an increase of $544,000 annually. Staff's cost of service study entered into the record would allow a $615,767 annual increase. PNM's filing showed a negative rate of return for the test year ended December 31, 1974, while the settlement rates indicated by Gallup's filing project a rate of return of 9.045%.[2]

Gallup objects to the settlement because it claims additional issues of fact remain to be resolved. Although the settlement would prescribe rates at the level of Gallup's served testimony, Gallup objects that it was unable on November 4, 1975 to serve a case on all issues of fact because PNM failed to supply data requested over one month earlier regarding Western Coal Company, partially owned by PNM.

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[2]PNM and the Commission Staff placed their evidence into the record at the prehearing conference. Gallup refused to do so on grounds that it has a right so withhold its case pending the closing of PNM's case.

Gallup has presented an offer of proof, prepared as testimony filed January 5, 1976, on the issue of fuel costs. It would purport to demonstrate that coal purchased by PNM from its 50% owned subsidiary, Western Coal Company, is more costly than coal purchased from nearby non-affiliated coal producers and that PNM's indicated return on its investment in 1974 was 57.1%. It also suggests that state regulatory agencies base just and reasonable rates for subsidiary prices on actual costs and not upon a comparison of prices. PNM has not rebutted Gallup's contentions concerning its indicated return on its investment in Western.

The Commission staff recommends approval of the settlement since the settlement rates are below Staff's recommendation and rejects Gallup's factual contentions. Staff points to the relatively low cost of Western's coal (26 cents per Mcf) versus the July, 1975, average nationwide cost of coal of 80.8 cents per MMBtu. Staff also says the PNM-Western coal contract appears to be cost based.

Gallup's offer of proof in the nature of prepared testimony raises questions not otherwise answered by the record. Gallup's offer of proof alleges that the coal contract in question does not base the rate for materials and supplies upon costs but upon wholesale price indices for commodity groups and claims there is an indicated return on PNM's investment in Western of 57.1%. Because factual issues concerning purchased fuel costs have been raised which are not resolvable by the record evidence, we will remand for the presentation of evidence directed to appropriateness of those costs.

We are unable to accept all of Gallup's factual allegations and still approve the settlement rates as just

and reasonable on this record. This situation renders inapplicable the cases cited by PNM which permit the approval of settlements over objection in certain cases.[5] Moreover, in another recent case, *Georgia Power Co.*, Opinion No. 711, [sic] to the settlement to be factually unsupported, it afforded that party an opportunity for cross-examination.

Gallup also objects that the settlement does not resolve the claimed discriminatory treatment of Gallup vis-a-vis CPS. Gallup says no basis exists for a lesser charge to CPS where CPS has a 47% greater entitlement to capacity than the peak load demand of Gallup during the 1974 test year and a further entitlement of 85% above that level within the first six months of 1975.

Staff and PNM respond that this issue should be rejected, noting PNM has filed in Docket No. ER76-308 proposed rate increases which, if approved, would result in a rate to CPS substantially higher than those proposed to Gallup based on 1974 costs.

We are today issuing an order approving the settlement at the proposed rates. This action moots this issue of discrimination raised by Gallup. We accordingly reject its request for hearing on this question.

In certifying this settlement to the Commission, the Presiding Administrative Law Judge recommended that the Commission approve the settlement and authorize the settlement rates to go into effect subject to refund and close the case subject to motion by Gallup to

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[5]PNM cites *Citizens for Allegan County, Inc.* v. *F.P.C.*, 414 F.2d 1125, 1128 (D.C. Cir. 1969); *Cities of Lexington, Ky.* v. *F.P.C.*, 295 F.2d 109, 121 (4th Cir. 1961); and *Pennsylvania Gas & Water Co.* v. *F.P.C.*, 463 F.2d 1242 (D.C. Cir. 1972).

remand on remaining issues. PNM and Staff support this recommendation while Gallup opposes it. We reject this recommendation.

As discussed above, Gallup has raised an issue that must be heard before the Commission acts pursuant to this Section 206 proceeding. We are not permitted by Section 206(a) of the Federal Power Act to authorize increased rates where both the contract between the parties prohibits unilateral filings and where we are unable to conclude the rates are just and reasonable. If the rates were permitted to become effective prior to finding them just and reasonable, it would be tantamount to permitting a unilateral filing. The impact of consideration of the coal fuel costs may demonstrate that the settlement rates are in excess of a just and reasonable rate. We therefore cannot accept the Judge's recommendation to place the settlement rates into effect subject to refund.

On July 6, 1976, Gallup filed a motion requesting that the Commission reopen the record in this proceeding so that the "price squeeze" issue can be considered. The motion is based on the Supreme Court's June 7, 1976 opinion affirming the Court of Appeals decision in *Conway, supra*. The Supreme Court in *Conway* held that the Commission has the jurisdiction to consider allegations that proposed wholesale rates are discriminatory and noncompetitive when considered in relation to the retail rates. This is known as the "price squeeze" issue. In view of the *Conway* Decision, the Commission has determined that it is necessary to permit Gallup to present evidence on the "price squeeze" issue in this reopened proceeding. The Commission has proposed the substantive standards it intends to apply in evaluating allegations of price squeeze in the Notice of Proposed Statement of Policy,

Policy Statement Concerning Electric Rate Schedule Filings and Requirement for Filing of Comparative Rate Information in Certain Situations, Docket No. RM76-29, issued July 29, 1976.

Accordingly, the Presiding Judge will be ordered to convene a conference to establish such further procedural dates as necessary. The settlement proposal will be rejected without prejudice to its further submission.

The Commission finds:

(1) Good cause exists to reject the settlement proposal and to reopen the record in accord with the provisions of this order.

(2) Good cause exists to grant Gallup's motion to reopen the record on the "price squeeze" issue.

The Commission orders:

(A) The Intervenors' Motion to reopen on the "price squeeze" issue is granted.

(B) Pursuant to the authority of the Federal Power Act, the Commission's Rules of Practice and Procedure, and the Regulations Under the Federal Power Act (18 CFR Chapter I), a prehearing conference shall be held at a date to be designated by the Presiding Administrative Law Judge, in a hearing room of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426.

(C) The Presiding Administrative Law Judge shall preside at the initial conference in this proceeding, with authority to establish and change all procedural dates, and to rule on all motions (with the exception of petitions to intervene, motions to consolidate and

sever, and motions to dismiss, as provided for in the Rules of Practice and Procedure).

(D) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGUATORY COMMISSION

ELECTRIC RATES: Rehearing

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Georgiana Sheldon, Matthew Holden, Jr., and George R. Hall.

Missouri Power & Light Company) Docket No. ER76-539
)

OPINION NO. 31-A

OPINION AND ORDER ON REHEARING

(Issued May 16, 1979)

On November 24, 1978, the City of Marceline, Missouri (Marceline or City) field an application for rehearing of Opinion No. 31 which was issued on October 27, 1978 in this docket. By order issued December 26, 1978, the Commission granted rehearing for the limited purpose of further consideration. On reconsideration, we shall address issues concerning burden of proof, wage adjustments, price squeeze and

comprehensive interperiod tax allocation. Marceline's remaining contentions raise no new facts or legal arguments to warrant further discussion.

A. Burden of Proof

The City contends that "the Commission wrongfully adopted as the burden of proof for [this] hearing the just and reasonable standard of Section 206 of the Federal Power Act rather than the heavier burden of the *Mobile-Sierra*[1] standard." Marceline claims that the pertinent language in its contract with MP&L was misinterpreted by the Federal Power Commission (FPC) in its Order Granting Petition for Rehearing and Amending Prior Order issued June 4, 1976, in this proceeding. We disagree.

In its June 4 order, the FPC quoted from the contract which states:

> . . . that said rates may be changed during the term of the contract, but only with the approval of the appropriate regulatory agency having jurisdiction.

We continue to view this contract language as providing for a change in rates prospectively, that is, after the Commission has determined the just and reasonable rates in a Section 206 proceeding. We therefore affirm the Presiding Judge's decision, based on the June 4 order, to exclude testimony proffered by Marceline that would have been necessary under the *Mobile-Sierra* burden of proof.

* * *

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[1]*United Gas Pipeline* v. *Mobile Gas Service Corp.* 350 U.S. 332 (1956); *F.P.C.* v. *Sierra Pacific Power Co.* 350 U.S. 348 (1956). In order to raise the rate under the *Mobile-Sierra* standard, the Commission would have to find that the contract rate is so low as to adversely affect the public interest.

NOT TO BE PUBLISHED — SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 79-1740 September Term, 1979

City of Marceline, Missouri,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent,

Missouri Power & Light Company,

Intervenor.

United States Court of Appeals
for the District of Columbia Circuit

FILED JUNE 21, 1980

GEORGE A. FISHER
CLERK

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

Before: BAZELON, Senior Circuit Judge, TAMM and WILKEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Federal Energy Regulatory Commission and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court.

See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the order of the Federal Energy Regulatory Commission under review herein is hereby affirmed.

Per Curiam
For the Court

George A. Fisher
Clerk

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

No. 80-1217

In the Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF GALLUP, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the Commission's determination that the contract for the sale of electricity involved in this case contemplated changes in rates under the "just and reasonable" standard of the Federal Power Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1217

CITY OF GALLUP, PETITIONER

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FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 628 F. 2d 1267. An earlier opinion of the court of appeals (Pet. App. 10a-23a) is reported at 557 F. 2d 227. The orders of the Federal Power Commission and its successor, the Federal Energy Regulatory Commission (Pet. App. 24a-72a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1980. A petition for rehearing was denied on October 21, 1980 (Pet. App. 9a). The petition for a writ of certiorari was filed on January 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e, are set forth at Pet. App. 73a-77a.

STATEMENT

The Public Service Company of New Mexico (PNM) is an electric utility that sells electricity for resale to petitioner, the City of Gallup, New Mexico. These sales are subject to the jurisdiction of the Commission under Subchapter II of the Federal Power Act, 16 U.S.C. 824 *et seq.*

Under Section 205(d) of the Federal Power Act, 16 U.S.C. 824d(d), utilities may unilaterally change their rates by filing with the Commission notification of such change. If properly filed, the rates may take effect, subject to suspension by the Commission, prior to the Commission's determination of their lawfulness. Section 206(a) of the Act, 16 U.S.C. 824e(a), empowers the Commission, on its own motion or on complaint, to impose, after a hearing, just and reasonable rates of prospective applicability.

In 1975, pursuant to Section 205 of the Act, PNM filed with the Commission a revised rate schedule proposing increased charges to Gallup. Gallup objected, arguing that the unilateral rate increase was precluded by its contract with PNM and this Court's decisions in *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (Pet. App. 45a-46a). In *FPC* v. *Sierra Pacific Power Co.*, *supra*, this Court held that a utility may not act unilaterally to increase rates during the term of a fixed rate contract by filing for a rate change pursuant to Section 205 of the Act. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, *supra*, stands for the same proposition with respect to sales of natural gas under the identical terms of Section 4 of the Natural Gas Act, 15 U.S.C. 717c. Both decisions further recognize, however, that the Commission may change the agreed-upon fixed rate if it is "so low as to adversely affect the public interest." *Sierra*, *supra*, 350 U.S. at 355; see *Mobile*, *supra*, 350 U.S. at 344-345.

The PNM-Gallup contract contained a provision entitled "Change In Rate," which expressly stipulated that a proposed rate increase by PNM "for any reason whatsoever" (except for fuel costs or tax adjustments) shall give Gallup the option of terminating the agreement (Pet. App. 84a). Another provision made the contract subject to "such changes or modifications as shall be ordered from time to time by any legally constituted regulatory body having jurisdiction to require such changes or modifications" (*id.* at 107a).

The Commission determined that the PNM-Gallup contract did not permit the unilateral filing by PNM of new rates under Section 205 of the Federal Power Act, but that it did envision rate changes authorized by the agency (Pet. App. 45a-49a). The Commission thereupon instituted a Section 206(a) proceeding to fix a just and reasonable rate of prospective applicability, expressly noting that this proceeding would not entail the heavy burden of proof required under the *Sierra* and *Mobile* decisions (Pet. App. 49a & n.5).

Both PNM and Gallup petitioned for review in the court of appeals. With respect to PNM's claim that its contract with Gallup permitted unilateral rate changes, the court of appeals affirmed the Commission's order, concluding that "the reference [in the contract] to changes ordered by a regulatory body * * * points toward a change after a § 206 proceeding, not a § 205 unilateral filing" (Pet. App. 20a-21a).[1]

In July 1978, following the Section 206 proceeding, the Commission approved settlement rates over Gallup's objection (Pet. App. 67a-69a).[2]

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[1]The court of appeals dismissed, as premature, Gallup's claim that the Commission had erroneously determined that the "just and reasonable" standard of proof, expressly sanctioned under the Act (16 U.S.C. 824e(a)), would apply in the forthcoming Section 206 proceeding (Pet. App. 21a-23a).

[2]Gallup objected notwithstanding the fact that the settlement rates were in large part based on Gallup's own figures (Pet. App. 7a).

Meanwhile, a few months earlier, PNM had proposed an additional increase in Gallup's rates pursuant to Section 206 of the Act. In June of 1978 the Commission instituted another Section 206 proceeding to determine the just and reasonable charges to Gallup. After reviewing the same contract that it had considered in the prior Section 206 proceeding, the Commission again concluded that the strict "public interest" burden of proof established in *Mobile* and *Sierra* should not apply to rate changes under the contract (Pet. App. 24a-33a). The Commission explained (*id.* at 43a) that, in its view, the parties had agreed contractually not to a specific rate but to "a rate changeable in a specific manner." The Commission concluded (*id.* at 44a; footnote omitted) that the clause in the contract providing

> that the rate shall be subject to change by order issued by the regulatory body having jurisdiction * * * clearly indicated that the parties did not intend to allow a change in rates by unilateral filings under Section 205, but only by "order" of the Commission, i.e. a change in rates prospectively after a Section 206(a) proceeding. Since the parties have prescribed a method for changing the rates there would be no need for the Commission to act under the overriding public interest standard enunicated in *Sierra* which only applies where the parties do not provide for any change in rates. Therefore, the *Sierra-Mobile* burden of proof does not apply to these proceedings.

Gallup's petitions for review of the Commission's determinations in both Section 206 proceedings were consolidated for consideration in the court of appeals. That court affirmed the Commission's interpretation of the contract. It held that the contract was not a "fixed rate" contract such that no change in the rate was permissible unless the exist-

ing rate was found to be so low as to adversely affect the public interest (Pet. App. 5a-7a).[3]

ARGUMENT

The court of appeals applied well established legal principles in affirming the Commission's ruling that the PNM-Gallup contract contemplated rate changes upon application of the "just and reasonable" test of Section 206 of the Act, rather than under the stricter *Mobile-Sierra* standard. The decision below does not conflict with any decision of this Court or any other court. Accordingly, further review is not warranted.

1. In the *Mobile-Sierra* line of cases this Court established two separate but related principles. First, a utility subject to regulation under the Federal Power Act may not abrogate a contractual obligation to provide service at a fixed rate by a unilateral filing for a rate increase with the Commission. Second, the Commission may not on its own motion change a contractually fixed rate absent a finding that that rate is "so low as to adversely affect the public interest." *Sierra*, *supra*, 350 U.S. at 355.[4]

The decision in this case does not violate that doctrine. The court of appeals simply affirmed the Commission's determination that the PNM-Gallup contract was not a fixed rate contract since it contemplated "a change in rates

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[3]The court observed (Pet. App. 5a-6a) that, unlike the contract involved in *Sierra*, which provided only for changes in rates by the California regulatory agency, the PNM-Gallup contract provided for rate changes as ordered by any legally constituted regulatory body with jurisdiction over the sales.

[4]In *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), this Court clarified the *Mobile-Sierra* doctrine by explaining that when the underlying contract does not establish a fixed rate the utility is free to seek a unilateral rate increase under the statute.

prospectively after a Section 206(a) proceeding" (Pet. App. 44a; footnote omitted). Petitioner takes issue with that determination, arguing that the language in its contract is substantially similar to the language of the contract involved in *Sierra* (Pet. 11). This contention is groundless. Petitioner ignores Article II of its contract, entitled "Change in Rate" (Pet. App. 84a), which expressly refers to rate changes during the contract term and which would be entirely superfluous if the contract were read to impose fixed rates. The contract involved in *Sierra* did not contain a comparable provision (see Pet. App. 108a-118a). Furthermore, unlike the PNM-Gallup contract, the *Sierra* contract provided only for rate changes by the California agency, and thus, as to any rate changes authorized by federal agencies, the *Sierra* contract could quite properly have been deemed to impose a fixed rate (see Pet. App. 6a). Here, on the other hand, it was clearly envisioned by the parties to the contract that the Commission—as a "legally constituted regulatory body" with jurisdiction over the sales (Pet. App. 107a)—would have authority to direct rate changes. In short, as the court below held, the *Sierra-Mobile* doctrine has no application to this case.

2. There is no merit to petitioner's further argument (Pet. 12) that the decision below conflicts with several decisions of the District of Columbia Circuit. In essence, petitioner argues that the D.C. Circuit has concluded that once it is determined that a contract does not permit unilateral rate changes under Section 205, then the strict "public interest" standard must necessarily apply in any Section 206 proceeding.[5] But the cases on which petitioner relies do not so hold.

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[5]Petitioner contends (Pet. 14) that, as construed by the D.C. Circuit, "the *Sierra* decision applies to all contracts not unilaterally modifiable by a utility under Section 205 procedures."

In both *Papago Tribal Utility Authority* v. *FERC*, 610 F. 2d 914 (D.C. Cir. 1979), and *City of Oglesby* v. *FERC*, 610 F. 2d 897 (D.C. Cir. 1979), the court of appeals stated that it was not deciding whether "the rigorous *Sierra* burden of proof must be employed * * * ." *Papago, supra*, 610 F. 2d at 930 n.127; *Oglesby, supra*, 610 F. 2d at 901 n.20. Similarly, in *Boroughs of Chambersburg* v. *FERC*, 580 F. 2d 573 (D.C. Cir. 1978), the question of the appropriate burden of proof in a Section 206 proceeding was not addressed. Moreover, the decision in *Richmond Power & Light Co.* v. *FPC*, 481 F. 2d 490 (D.C. Cir.), cert. denied, 414 U.S. 1068 (1973), is fully consistent with the decision below. In *Richmond, supra*, 481 F. 2d at 497, the D.C. Circuit expressly recognized that parties could agree by contract to a rate that, although not fixed for the contract term, could not be unilaterally changed, *i.e.*, "a rate changeable in a specific manner." To that extent, *Richmond* refutes petitioner's contention (Pet. 14) that "all contracts not unilaterally modifiable" are "fixed rate" contracts to which the *Sierra* decision applies.

Finally, in *City of Marceline* v. *FERC*, No. 79-1740 (D.C. Cir. June 21, 1980), the burden of proof question presented here was presented to the District of Columbia Circuit. The court there affirmed without opinion the Commission's decision that a contract, the terms of which were substantially the same as those at issue here, did not permit unilateral rate changes but did contemplate that the rates could be changed during the contract term pursuant to Section 206 under the "just and reasonable" standard of proof.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

DOJ-1981-03

No. 80-1217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF GALLUP, *Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al., Respondents.*

REPLY OF PETITIONER TO BRIEFS IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

1. Does the Federal Energy Regulatory Commission have the authority to order an increase in rates fixed by contract without complying with the legal standard mandated by this Court in *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956)?

Parties To The Proceeding Below

City of Gallup, New Mexico

Federal Energy Regulatory Commission

Public Service Company of New Mexico

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1217

CITY OF GALLUP, *Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al., Respondents.*

REPLY OF PETITIONER TO BRIEFS IN OPPOSITION

OPINIONS BELOW, JURISDICTION, STATUTORY PROVISIONS AND STATEMENT OF THE CASE

The Opinions below, Jurisdiction, Statutory Provision and Statement of the Case have previously been set forth in the petition for a writ of certiorari.

INTRODUCTION

Pursuant to Rule 22.5 of the Supreme Court Rules of Practice, Petitioner City of Gallup (hereinafter Gallup) herewith submits this reply to the briefs in opposition of Respondents Federal Energy Regulatory Commission (hereinafter Commission) and Public Service Company of New Mexico (hereinafter PNM).

ARGUMENT

1. The Commission Made A Legal Determination

PNM categorizes the issue presented to this Court as a "fundamentally factual question of the intent of the parties to a contract" which this Court should be reluctant to review. Brief for Respondent PNM in Opposition (PNM Brief) at 6.

Categorizing the relevant administrative decisions as findings of fact is misleading. The Commission most decidedly did *not* make any factual investigation concerning the "intent" of PNM and Gallup. Instead the Commission made the purely legal determination that the *Sierra* decision, *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), does not apply to a contract that contains language recognizing the possibility of Commission-ordered changes. (App. 49). While this legal determination may have been reached via the interpretation of a contract:[1]

> the record nowhere discloses that the Commission arrived at its interpretation . . . on the basis of specialized knowledge. . . . On the contrary the opinions of the examiner and the Commission show that both treated the question as one to be determined simply by the application of ordinary rules of contract construction. . . . It is apparent that the Commission rested its determination upon a construction of the words of the contract as it supposed a court would interpret them.

Texas Gas Transmission Corp. v. *Shell Oil Co.*, 363 U.S. 263, 268-69 (1960) (footnote omitted).

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[1] PNM notes that the D.C. Circuit has stated that Commission *Mobile-Sierra* decisions will be upheld if amply supported both factually and legally. PNM Brief at 6. This standard has not deterred the D.C. Circuit from overturning Commission rulings which had found the *Mobile-Sierra* decisions inapplicable to specific contracts, *e.g.*, City of Oglesby v. FERC, 610 F.2d 890 (D.C. Cir. 1979); Papago Tribal Util. Auth. v. FERC, 610 F.2d 914 (D.C. Cir. 1979).

Accordingly, any considerations of the scope of review of administrative determinations need not deter this Court from reviewing the decision of the Court of Appeals. *Id.* at 270.

Assuming, *arguendo*, that the Commission's determination is a finding of fact, such a finding is still reviewable by this Court in order to determine if it is "amply supported both factually and legally." PNM Brief at 6. Classifying the Commission decision as a finding of fact does not make the agency's flagrant and conscious disregard of Supreme Court precedent forgivable. The Commission, in effect, has slapped the face of the Supreme Court. Whether it was with the hand of law or the hand of fact is immaterial.

2. The Conflict With *Sierra* Exists Because The Commission Determined That *Sierra* Did Not Apply

PNM does not dispute the fact that the decisions below conflict with *Sierra*, but instead argues that *Sierra* does not apply to the PNM-Gallup agreement. PNM Brief at 6. This argument confuses petitioner's contention of a conflict with *Sierra* with an argument on the merits.

There is no language in either the *Sierra* decision itself or in any post-*Sierra* pronouncement of this Court indicating that *Sierra* does not apply to contracts containing language recognizing the possibility of Commission-ordered changes in rates. In fact, the contract before this Court in *Sierra* contained such a clause. *See* App. 117.

By its terms, *Sierra* applies to the PNM-Gallup contract. The Commission and the Tenth Circuit, however, did not apply the *Sierra* standard to the PNM-Gallup contract. Accordingly, the conflict between the decisions below and *Sierra* is "direct and irreconcilable." Gallup Petition at 12.

Arguing that the *Sierra* decision does not apply does not change the fact that the decisions below conflict with *Sierra*. It is precisely because the language of *Sierra* indicates that the decision *would* apply to the PNM-Gallup contract that the conflict exists.

3. *Sierra* Has Not Been Modified By The Courts Of Appeals

As support for the argument that *Sierra* is inapplicable, PNM cites *Louisiana Power & Light Co.* v. *FERC*, 587 F.2d 671 (5th Cir. 1979); *City of Kaukauna* v. *FERC*, 581 F.2d 993 (D.C. Cir. 1978); and *Richmond Power & Light Co.* v. *FPC*, 481 F.2d 490 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973). Respondents apparently feel that *Sierra* has been modified by *dicta* in decisions of the Courts of Appeal. Petitioner submits that if *Sierra* is to be modified that modification should emanate from *this* Court.[2] Indeed it is with the hope of receiving an express ruling concerning the scope of *Sierra* that this petition has been submitted.

That the quoted language of *Kaukauna, Richmond* and *Louisiana Power & Light* is *dicta* is obvious. In *Louisiana Power & Light*, the parties *stipulated* that the burden of proof issue was not involved in the appeal.[3] Thus, the remarks of the Fifth Circuit in that case are purely gratuitous.

While this Court may find the logic of the Fifth Circuit pursuasive in an ultimate disposition of this case on the merits, the language quoted by PNM, PNM Brief at 11-12, does not eliminate the conflict between the decisions rendered by the Commission and the Tenth Circuit in this proceeding and the holding of *Sierra*.

The specific manner of change *dictum* of the D.C. Circuit concerned either whether the "specific manner" allowed a utility unilaterally to file a rate increase, *Richmond*, 481 F.2d at 494, or whether unilaterally filed rates were allowed to become effective prior to a final Commission determination that the new rates were lawful, *Kaukauna*, 581 F.2d at

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[2] As noted by petitioner, Gallup Petition at 10-11, the latest statement concerning *Sierra* made by this Court indicated that the Commission is *without authority* to raise rates above contract levels without complying with *Sierra*. FPC v. Texaco, 417 U.S. 380, 391.

[3] This stipulation is reprinted as an Appendix to this reply. (Reply App. 1a).

995. Those decisions did not address the issue of whether *Sierra* was applicable to contracts containing clauses similar to Article XII of the PNM-Gallup agreement.

Even if *Louisiana Power & Light, Richmond* and *Kaukauna* were relevant, Respondents' reliance on those decisions would be misplaced. By equating the authority conferred upon the Commission by the Federal Power Act with the "mechanics of rate change", Respondents misconceive the structure of the Act. Sections 205 and 206 of the Act are *not* "alternative rate-changing 'procedures.' " 350 U.S. at 340, *see* Gallup Petition at 8. The power given the Commission to review rates made in the first instance by electric utilities exists independently of any contract.

A party to a rate contract has a right to request a Commission investigation of existing rates. This right is *statutory*, not contractual. In investigating existing rates under Section 206 of the Act, the Commission is acting pursuant to a statute not pursuant to a contract.

Accordingly, the authority of the Commission to change contract rates is governed by the Federal Power Act as interpreted by the Supreme Court, not by a contract interpreted by the Commission. Section 206 of the Act has been interpreted by this Court as requiring a finding that *existing* contract rates are so low as to conflict with the public interest whenever the Commission orders an increase in rates above the contract level. 350 U.S. at 355. As noted by the Commission itself, *Sierra* limits the statutory authority of the Commission. *Carolina Power & Light Co.*, 47 F.P.C. 1, 4 (1972). This limitation applies to every Section 206 investigation whose result is a Commission order raising rates above contract levels. The limitation is required in order to effectuate the purposes of the Act. 350 U.S. at 355.

Louisiana Power & Light, Kaukauna, and *Richmond* do not alter the statutory requirements of the Act articulated by this Court in *Sierra*. The precedent established by those deci-

sions in does not change the fact that the decisions of the Commission and the Tenth Circuit in this case conflict with *Sierra*.

Even if the Commission's statutory authority is viewed as part of the mechanics of rate change, *Kaukauna* and *Richmond* make clear that the principles of *Sierra* extend to those mechanics. In fact, those decisions applied *Mobile-Sierra* principles to contracts envisioning change by the Commission. Thus, the applicability of the *Sierra* rule to contracts "changeable in a specific manner" is entirely consistent with *Kaukauna* and *Richmond*.

4. A Conflict In Reasoning Exists

PNM notes that the D.C. Circuit has never directly passed on the issue presented by this Petition. PNM Brief at 13-16. Gallup had not claimed the contrary but instead merely pointed out that the Commission decisions below, by seizing on contractual language recognizing the possibility of regulatory change to support a finding that the PNM-Gallup agreement was not for a single fixed rate, employed reasoning that conflicted with decisions of the D.C. Circuit. Gallup Petition at 12-14.

The D.C. Circuit's decisions on whether a utility could unilaterally increase rates considered and rejected the identical argument raised by the Commission herein and adopted by the Tenth Circuit, i.e., that a contract expressly made subject to regulatory authority is not a fixed rate contract. The D.C. Circuit concluded that this argument was without merit because *under the law* every electric power contract must contemplate such authority, *Richmond*, 481 F.2d at 499. It is the Tenth Circuit's acceptance of this argument that creates the conflict in reasoning noted by petitioner.

5. The Commission Has Not Been Consistent

Respondent's contention that the Commission has consistently applied the reasoning adopted below, PNM Brief at 10-11, is erroneous.

The contracts before the Commission in *Carolina Power & Light*, 47 F.P.C. 1 (1972), contained a provision which

> expressly recognizes that the schedule is subject to change by action of a regulatory body, and that the Government Customer Contracts contain a like recognition concerning the rate for deficiency energy.

Id. at 13-14.

Despite the presence of this contract language the Commission held that:

> because of the *Sierra* decision, it would not be enough to show in a proceeding under Section 206(a) that Carolina's rate to the Cooperatives is unprofitable. To achieve a change in the rate fixed by contract, the more stringent test set forth in *Sierra* would have to be met.

Id. at 4-5.

A comparison of the Commission decision in *Carolina Power & Light* with the Commission decision below shows that the Commission is acting completely arbitrarily in its handling of *Mobile-Sierra* cases.

6. The Gallup-PNM Contract Is Indistinguishable From The Contract Before This Court In *Sierra*

The Commission claims the PNM-Gallup contract is distinguishable from the contract before this Court in *Sierra*. This contention is based on Article II of the PNM-Gallup contract and the fact that the *Sierra* contract referred to change by a state, as opposed to a federal, agency. (Commission Brief at 6).

The Commission's arguments are unpersuasive. Article II merely preserves for Gallup an option to terminate the agreement in the event the Commission should raise rates after making the public interest finding required by *Sierra*.

The frivolousness of this attempted distinction is demonstrated by the Commission's own action in *West Texas Utilities Co.*, FERC Docket Nos. ER80-38 and ER80-121

(issued June 16, 1980).[4] In *West Texas* the Commission expressly held that the *Sierra* burden of proof was applicable to a contract that contained a termination clause.[5] Reply App. 7a. In light of *West Texas*, the Commission's attempted distinction of the Gallup-PNM contract based on the termination clause of the agreement is totally frivolous, arbitrary and capricious.

The fact that the two contracts mention different regulatory agencies is a distinction without a difference. The reasoning followed by the Commission leads to the conclusion that whether a contract is deemed to be "fixed-rate" depends upon what agency the parties are before. (Commission Brief at 6). It is extremely unlikely that this Court in *Sierra* created such an illogical distinction.

The Commission's argument is that if the *Sierra* contract referred to change by "order of the FPC," or "appropriate regulatory body" the Supreme Court would have concluded that the intent of the parties was to permit change pursuant to Section 206(a) of the Federal Power Act. The argument, however, allows a "just and reasonable" standard of proof,

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[4] Reprinted in the Appendix to this reply. Reply App. 5a.

[5] Article 3

> (a). . . It is understood and agreed, however, that this rate schedule is expressly subject to change by such governmental regulatory or other body as may have jurisdiction in the matter.
>
> (b) In the event Company obtains a change in its retail rates generally in effect over its system and based thereon propose that the above Rate schedule be changed, Company will give City sixty (60) days written notice prior to the proposed effective date of the change. In the event the parties hereto cannot agree on the proposed change, Company may place the proposed change into effect six (6) months from the date City was notified of the proposed change and City may terminate this contract by giving twenty-four (24) months written notice within one hundred and twenty (120) days after the effective date of the rate change.

Reply App. 5a and 6a.

rather than the far heavier burden of proof enunciated in the *Sierra* decision. Gallup respectfully submits that the Commission's explanation is implausible, and impugns the intellect and judicial reasoning of the Supreme Court.

Certainly, the Supreme Court carefully reads contracts which are before it in cases on review. Consequently, when the Supreme Court imposed the heavy burden of proof in the *Sierra* case, it was aware that the underlying contract contained language providing for change by regulatory order. If that language could be interpreted to mean that the parties intended change upon a showing that some other rate was just and reasonable, the Commission in effect suggests that the Supreme Court failed to recognize the parties' intent and that the Court permitted a fundamental change in the parties' substantive relationship due to a change of regulatory jurisdiction. The only alternative explanation would be that the parties deliberately incorporated in the contract reference to a regulatory body which *did not have jurisdiction* to effect changes in rates. In other words, they deliberately incorporated in the contract a clause which was substantive nullity. Gallup respectfully submits that both interpretations are absurd.

The simple fact of the matter is that the regulatory change language in the Sierra contract constituted "boiler plate" acknowledgment of regulatory authority, that is virtually indistinguishable from the "boiler plate" acknowledgment of such authority contained in the Gallup contract. In the *Sierra* case, the Supreme Court imposed the heavy burden of proof as a condition precedent to setting aside the contract rate not because the parties had *failed* to state that the rates could be changed by the Federal Power Commission, but because the parties had agreed that the rates could be changed *only* by mutual agreement or an order entered by the appropriate regulatory body in the public interest.

The basic fault with the Commission's contract analysis lies with the underlying assumption that the *Sierra* rule is ap-

plicable only to fixed rate contracts. (Commission Brief at 5-6). Petitioner asserts that there is no support for this assumption in any decision of this Court including *Sierra*.

In essence the issue presented by this petition is whether agencies will be permitted to ignore Supreme Court precedent simply by asserting legally frivolous distinctions. All agency adjudications will, in some way, be distinguishable from all previous adjudication. If an administrative agency, which openly states that it disagrees with a decision of this Court, *see* Gallup Petition at 16, is allowed to avoid that decision by making distinctions as meritless as in the instant case, then the value of Supreme Court precedent will be nil. If the decisions below go unreviewed this Court will be inviting agencies to refuse to follow the dictates of the Supreme Court whenever an agency disagrees with this Court's conclusions. This Court must refuse to declare such an open season on its own authority.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that a writ of *certiorari* issue forthwith to the Tenth Circuit Court of Appeals.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
WHEATLEY & WOLLESEN
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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-3452

LOUISIANA POWER & LIGHT COMPANY, *Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent.*

STIPULATION
(January 20, 1978)

WHEREAS:

1. In its orders of September 30, 1977 and November 21, 1977 the Federal Power Commission ordered a hearing under Section 206 of the Federal Power Act on whether a rate proposed by the Louisiana Power & Light Company is reasonable, meets other standards of Section 206 of the Federal Power Act and should be instituted following hearing.

2. The Cities of Winnfield, Vidalia and Jonesville contend that the Commission should have ordered a hearing under a different standard. The Cities contend the Commission should have ordered a hearing under a different standard. The Cities contend the Commission should have ordered a hearing to determine whether existing contract rates are so low as to jeopardize LP&L's continued service, and are thereby contrary to the public interest.

3. All parties agree that appeal of that portion of the Commission's Order at this time would be premature because the Cities are not presently aggrieved within the meaning of Section 313(b) of the Federal Power Act, 16 U.S.C. §825 *l*(b). See *Public Service Company of New Mexico* v. *F.P.C.*, 557 F.2d 227, 232-3 (10th Cir., 1977).

THEREFORE:

The Louisiana Power & Light Company, the Cities of Winnfield, Vidalia and Jonesville, Louisiana (hereinafter Cities), and the Federal Energy Regulatory Commission through their attorneys hereby stipulate that no signatory hereto will contend, if and when cities seek to appeal said decision at a time when they are aggrieved, that such appeal is untimely because the Cities should have appealed from the Commission's order of November 21, 1977.

This stipulation is made pursuant to Rule 33 of the Federal Rules of Appellate Procedures.

Date: Jan. 17, 1978 Signed: WALLACE E. BRAND
Attorney for the Cities of Winnfield, Vidalia and Jonesville, Louisiana

Date: Jan. 17, 1978 Signed: RICHARD M. MERRIMAN
Attorney for Louisiana Power & Light Company

Date: Jan. 17, 1978 Signed: PHILIP R. TELLEEN
Attorney for the Federal Energy Regulatory Commission

Date: _____ Approved: _____

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Stipulation upon the persons listed below by depositing a copy in the United States mail, postage prepaid.

Dated at Washington, D.C. this 17th day of January 1978.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. ER80-38 and ER80-121

Before Commissioners:
CHARLES B. CURTIS, *Chairman;* GEORGIANA SHELDON, and GEORGE R. HALL.

WEST TEXAS UTILITIES COMPANY

Order Denying Application For Rehearing

(Issued June 26, 1980)

March 13, 1980, West Texas Utilities Company (WTU) filed an application for rehearing of the Commission's suspension order issued February 4, 1980.

In the suspension order the Commission denied WTU's request for rate change relief from City of Sonora under Section 206 of the Federal Power Act. The ground of denial was that increased rates to Sonora are allowable, under the present contract between the parties, only upon its expiration or renegotiation or to reflect a retail rate change generally in effect on WTU's system.

WTU contends that the Commission erred in denying its request on the ground that subsection (a) of Article 3 of its "Agreement for Electric Service to the City of Sonora"[1] is

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[1] Article 3

(a). . . It is understood and agreed, however, that this rate schedule is expressly subject to change by such governmental regulatory or other body as may have jurisdiction in the matter.

(b) In the event Company obtains a change in its retail rates generally in effect over its system and based thereon proposes that the above Rate schedule be changed, Company will give City sixty (60) days written notice prior to the proposed effective date of the

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nearly identical to the contractual language at issue in *Public Service Co. of New Mexico* v. *FPC*, 557 F.2d 227 (10th Cir. 1977),[2] on the basis of which the Commission ordered a Section 206 proceeding to determine a just and reasonable rate for PNM's service to City of Gallup. The Commission determination was that the *Sierra-Mobile* burden of proof[3] did not

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change. In the event the parties hereto cannot agree on the proposed change, Company may place the proposed change into effect six (6) months from the date City was notified of the proposed change and City may terminate this contract by giving twenty-four (24) months written notice within one hundred and twenty (120) days after the effective date of the rate change.

[2] Article XII of the PNM/Gallup contract, which WTU contends is analogous to Article 3(a) of the WTU/Sonora contract, provides:

The contract including tariff made a part hereof, shall at all times be subject to such changes or modification as shall be ordered from time to time by any legally constituted regulatory body having jurisdiction to require such changes or modifications. (557 F.2d at 228).

Article II of the PNM/Gallup contract provides:

Notwithstanding the earliest effective date of termination (July 1, 1977) as set forth in Article II (Term) above, should the rates charged herein to the Consumer by the Company be increased for any reason whatsoever other than fuel cost or tax adjustments provided for herein, then and in that event, the Consumer shall immediately have the option within ninety (90) days after the Consumer is given notice of such rate increased to terminate this agreement; provided, however, that the Company will supply for a two (2) year period thereafter such power and energy in accordance with the new or increased rates as may be requested by Consumer from time to time up to the amount specified in Article IV hereof. (557 F.2d at 299).

[3] *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). In the *Sierra* opinion at 355, the burden is described as a showing that the contract rate "is so low as to adversely affect the public interest-as where it might impair the financial ability of the public utility to continue its service, cast upon other customers an excessive burden, or be unduly discriminatory."

apply for a rate change under Section 206 because rate changes by the FERC were envisioned in Article XII of the PNM/Gallup contract.

In its response filed May 2, 1980, Sonora relies upon subsection (b) of Article 3 in countering that rate changes other than ones occasioned by renegotiation or termination of the contract are permitted under the contract only when necessary to preserve the competitive relationship between Sonora and WTU in retail markets. Any other proposed changes fall within the scope of the *Sierra-Mobile* burden, above. We agree.

The differences, rather than the similarities in the contractual language at issue in the two cases, are dispositive of the dispute here. Although the WTU/Sonora and the PNM/Gallup contracts both include provisions for notice of rate change and for termination by the customer in the event of such change, the language in Article 3(b) of the WTU/Sonora contract apparently was included to preserve the relative competitive position of the parties in the retail markets. The subsection expressly limits rate changes to those proposed:

> (i)n the event Company obtains a change in its retail rates generally in effect over its system. . . .

Article 3(b); "Agreement for Electric Service to the City of Sonora." No such limitation was in the PNM/Gallup contract. Instead, that contract provided for rate changes proposed:

> *for any reason whatsoever* other than fuel cost or tax adjustments provided for herein. . . .

557 F.2d 229; emphasis added. Thus, although both contracts provide for notice and termination procedures in the event of a rate change, the scope of rate changes allowable under the WTU/Sonora contract is restricted to three specifically iden-

tified circumstances,[4] while the scope of rate changes allowable under the PNM/Gallup contract is virtually infinite.

WTU also contends that subsections (a) and (b) of Article 3 are independent provisions setting forth separate methods to effectuate changes in the contract rate to Sonora. WTU notes that at the time the contract became effective it was not subject either to FERC or to Texas Public Utility Commission (TPUC) jurisdiction. Article 3 is explained as a statement of anticipation of possible regulatory jurisdiction during the term of the contract and, therefore, provides in subsection (a) a mechanism for rate changes additional to subsection (b).

We disagree. While Section (a), standing alone, might be interpreted as WTU suggests, we believe that it is qualified by Section (b). We view Article 3 as an integrated set of provisions for the effectuation of rate changes; subsection 3(a) recognizes potential regulatory forums to administer such changes and subsection 3(b) identifies factual prerequisites for effectuation of any rate changes, whether administered by the FERC or by the TPUC, or otherwise.

Our approach to the WTU/Sonora contract is like that in *Richmond Power & Light Co.* v. *FPC*, 481 F.2d 490 (D.C. Cir. 1973),[5] where the Court looked to the competitive relationship between the parties as a guide to the interpretation of their contract language:

> The parties to this particular contract each had certain interests it sought to protect in drafting the provision under discussion. . . . We see no reason why the integrity of this contractual undertaking is any less deserving of protection under the Act than one for a single fixed rate.

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[4] *Viz*, upon the expiration or renegotiation of the contract or to reflect a retail rate change generally in effect on WTU's system.

[5] *cert. denied sub nom. Indiana and Michigan Electric Co.* v. *Anderson Power & Light Co.*, 419 U.S. 1068 (1973)

481 F.2d at 497. Outside of termination, renegotiation, or general retail rate increases, proposed changes to the WTU/Sonora contract rate are subject to the *Sierra-Mobile* burden of establishing the existence of public interest considerations sufficiently compelling to disturb the contractual relations of the parties. Since WTU's request for rate relief from Sonora is based neither upon the allegation that rate relief is in conformity with any of the three prerequisites in Article 3(b), nor upon the allegation that the contract rate is so low as to adversely affect the public interest, we shall deny the application for rehearing.

The Commission orders:

(A) The application for rehearing is denied.

(B) The Secretary shall promptly publish this order in the Federal Register.

By the Commission.

(SEAL)

/s/ LOIS D. CASHELL
Lois D. Cashell,
Acting Secretary